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In the
SUPREME COURT OF THE UNITED STATES

October Term, 2003

MITCHELL ROSENQUIST,

Petitioner,

vs.

OTTAWAY NEWSPAPERS, INC. d/b/a,
The Plattsburgh Press Republican,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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PETITION FOR A WRIT OF CERTIORARI

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Petitioner Mitchell Rosenquist respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

QUESTIONS PRESENTED FOR REVIEW

The decision of the Second Circuit holding that Mitchell Rosenquist was *too* disabled to perform the essential functions of his job as a reporter, after he was released to return to work by his treating physician, based only upon the cursory examination by the employer's chosen doctor without accommodations, without an independent examination by a vocational expert or a job trial, means that *any* person who is disabled enough to be covered by the ADA can never prove he is able to perform the essential functions of the job. It raises two questions that this Court should review:

1. Did the Second Circuit err and cause a conflict with other reporting Circuits in holding that the interactive process in an Americans With Disabilities Act ("ADA") case does *not* require an impartial vocational test or a trial work period to determine whether an employee is capable to performing the essential functions of his job with or without accommodations after the employer's own doctor, in a cursory, unscientific and unreliable test, performed without accommodations, and outside his area of expertise, opined that the employee could not perform those functions?

2. Did the Second Circuit err and cause a conflict with other reporting Circuits in determining that an ADA claim can be dismissed on summary judgment even though the Equal Employment Opportunities Commission ("EEOC") held, after an investigation, that there was probable cause of a violation of the ADA by the employer?

LIST OF PARTIES TO THE PROCEEDINGS

Plaintiff: Mitchell Rosenquist. *Defendant*: Ottaway Newspapers, Inc. d/b/a The Plattsburgh Press Republican (wholly owned by Dow Jones Ventures VI, Inc., which is wholly owned by Dow Jones & Company).

TABLE OF CONTENTS

	page
Questions Presented for Review	1
List of Parties to the Proceedings	2
Table of Contents	2
Table of Authorities	3
Citation to Opinions	5
Jurisdictional Statement	5
Statutes and Regulations Involved	5
Statement of the Case	9
A. Procedural History	10
B. Uncontested Facts	11
Reasons for Granting Writ	14
I. The Second Circuit erred in holding that a employee does not have the right to a neutral examination or a period of trial employment in determining if he can perform the essential functions of the job to which he wants to return	14
II. The Second Circuit erred in upholding summary judgment against an employee even though the EEOC determined after an investigation that there was probable cause of a violation of the ADA	19
Conclusion	21
Appendix	
Decision of the Second Circuit	23
Decision of the Northern District of New York	27
Decision of the EEOC	63

TABLE OF AUTHORITIES

page

Cases:

Abrams v. Lightolier, 702 F.Supp.509 (D.N.J. 1988), aff'd in part, vacated in part, 50 F.3d 1204 (3d Cir. 1995)..... 20

Barnes v. Northwest Iowa Health Center, 238 F.Supp.2d 1053 (N. D. Iowa 2002)..... 16

Belk v. Southwestern Bell Telephone Company, 194 F.3d 946, 951 (8th Cir. 1999)..... 15

Bell v. Birmingham Linen Service, Inc., 715 F.2d 1552 11th Cir.1983)..... 20

Buck v. Fries & Fries, Inc., 953 F. Supp. 896 (S. D. Ohio 1996), aff'd, 1998 U. S. App. LEXIS 7074 (6th Cir. 1998)..... 16

Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 86 (2002)..... 16

Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440, 123 S. Ct. at 1680 (2003)..... 14

Crocker v. Runyon, 207 F.3d 314 (6th Cir. 2000)..... 17

Doane v. City of Omaha, 115 F.3d 624, 630 (8th Cir. 1997)..... 15

Echazabal v. Chevron USA, Inc., 336 F. 3 1023 (9th Cir. 2003)... 16

EEOC v. Patrick Henry Education Association, 741 F. Supp. 670 (N. D. Ohio 1990), vacated on other grounds, 1990 U. S. App. LEXIS 13699 (6th Cir. 1990) 20

Gifford v. Atchinson, Topeka, and Santa Fe Railway Company, 685 F.2d 1145, 1156 (9th Cir. 1981)..... 19

Gorin v. Apollo Travel Services, 1999 U. S. Dist. LEXIS 22209 (N. D. Ga. 1999)..... 18

Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 677 (1st Cir. 1995)..... 14

Hall v. U.S. Postal Serv., 857 F.2d 1073, 1079 (6th Cir. 1988)..... 15

Henderson v. Ardco, Inc., 247 F.3d 645, 653 (6th Cir. 2001)..... 15

Hogan v. Bangor and Aroostook Railroad Co., 61 F.3d 1034 (1st Cir. 1995)..... 17
Hutchinson v. U.P.S., Inc., 883 F. Supp. 379, 397 (N. D. Iowa 1995)..... 15
McGregor v. Nat'l R.R. Passenger Corp., 187 F. 3d 1113, 1116 (9th Cir. 1999) 15
McMackins v. The Elk Grove Unified School District, 21 F.Supp.2d 1201 (E. D. Cal. 1998)..... 18
Mitchell v. Office of the Los Angeles County Superintendent of Schools, 805 F.2d 844, 847 (9th Cir. 1986), cert. denied, 484 U.S. 858 (1987) 19
Oswald v. LaRoche Chemicals, Inc., 894 F. Supp. 988 (E. D. La. 1995)..... 15
Palasota v. Haggar Clothing Co., 342 F.3d 569, 577 (5th Cir. 2003) cert den., 2004 U.S.LEXIS 1137 (2004)..... 20
Porter v. U.S. Alumoweld Company, Inc., 125 F.3d 243 (4th Cir. 1997)..... 17
Sadruddin v. City of Newark, 34 F.Supp.2d 923 (D.N.J. 1999)..... 20
Smith v. Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972)..... 20
Sprague v. United Airlines, Inc., 2002 U. S. Dist. LEXIS 14519 (D. Mass. 2002)..... 19
Stillwell v. Kansas City Board of Police, 872 F.S. 682, 688 (W. D. Mo. 1995)..... 14
Stutts v. Freeman, 694 F.2d 66 (11th Cir. 1983)..... 15
Swanson v. Allstate Insurance Company, 102 F.Supp.2d 949 (N. D. Ill. 2000)..... 14, 17
Valentine v. American Home Shield Corporation, 939 F. Supp. 1376 (N. D. Iowa 1996)..... 19
Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29, 35 (1st Cir. 2000)..... 15
Webster v. Methodist Occupational Health Centers, Inc., 141 F.3d 1236 (7th Cir. 1998) 18, 19

Statutes:

42 U.S.C. § 12112 (a)..... 15
42 U.S.C. § 12112 (d) (4)..... 15

Regulations and Administrative Rulings:
29 C.F.R. § 1630.14 (a)..... 14
29 C.F.R. §§ 1630.10, 1630.11 and 1630.14 (c)..... 15
EEOC Compliance Manual ¶V (5.6)..... 14, 15

CITATION TO THE OPINIONS

The decision of the Second Circuit is unofficially reported at Rosenquist v. Ottaway Publishing, Inc. 2004 U.S.App.LEXIS 1580 (2d Cir. 2004). The decision of the District Court for the Northern District of New York is unpublished. The Decision of the EEOC is unpublished.

JURISDICTIONAL STATEMENT

The Order denying Plaintiff's Appeal was entered by the Second Circuit on February 3, 2004. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. §1254(1).

THE STATUTES AND REGULATIONS INVOLVED

THE AMERICANS WITH DISABILITIES ACT ("ADA")

42 U.S.C. § 12111:

(8) Qualified individual with a disability. The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. . . .

(9)Reasonable accommodation. The term "reasonable accommodation" may include--

(A)making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and

(B)job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12112

(b) Construction. As used in subsection (a), the term "discriminate" includes-- . . .

(6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and

(7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

(d) Medical examinations and inquiries.

(1) In general. The prohibition against discrimination as referred to in subsection (a) shall include medical examinations and inquiries.

(2) Preemployment.

(A) Prohibited examination or inquiry. Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry. A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions. . .

(4) Examination and inquiry.

(A) Prohibited examinations and inquiries. A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) . . . A covered entity may make inquiries into the ability of an employee to perform job-related functions.

THE ADA REGULATIONS:

29 C.F.R. § 1630.2:

(o)(3) To determine the appropriate reasonable accommodation it may be necessary for the covered entity to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

29 C.F.R. § 1630.10:

It is unlawful for a covered entity to use qualification standards,
employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities, on the basis of disability, unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity.

29 C.F.R. § 1630.11:

It is unlawful for a covered entity to fail to select and administer tests concerning employment in the most effective manner to ensure that, when a test is administered to a job applicant or employee who has a disability that impairs sensory, manual or speaking skills, the test results accurately reflect the skills, aptitude, or whatever other factor of the applicant or employee that the test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

APPENDIX TO 29 C.F.R. PART 1630- INTERPRETIVE GUIDE TO THE ADA.

Section 1630.9:

. . . When a qualified individual with a disability has requested a reasonable accommodation to assist in the performance of a job, the employer, using a problem solving approach, should: (1) Analyze the particular job involved and determine its purpose and essential functions; (2) Consult with the individual with a disability to ascertain the precise job-related limitations imposed by the individual's disability and how those limitations could be overcome with a reasonable accommodation; (3) In consultation with the individual to be accommodated, identify potential accommodations and assess the effectiveness each would have in enabling the individual to perform the essential functions of the position; and (4) Consider the preference of the individual to be accommodated and select and implement the accommodation that is most appropriate for both the employee and the employer. . . .

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ("EEOC") COMPLIANCE MANUAL

Section 5.6:

1. If a test screens out or tends to screen out an individual with a disability . . . it must be job-related and consistent with business necessity. * This requirement applies to all kinds of tests, including, but not limited to: aptitude tests, tests of knowledge and skill, intelligence tests, agility tests, and job demonstration. A test will most likely be an accurate predictor of the job performance of a person with a disability when it most directly or closely measures actual skills and ability needed to do a job. For example: a typing test, a sales demonstration test, or other job performance test would indicate what the individual could do in performing a job, whereas a test that measured general qualities believed to be desirable in a job may screen people out on the basis of disability who could do a job. . . .

2. Accommodation in testing. The ADA requires that tests be given to people who have impaired sensory, speaking, or manual skills in a format and manner that does not require use of the impaired skill, unless the test is designed to measure that skill. (Sensory skills include the abilities to hear, see and to process information.)

   The purpose of this requirement is to assure that tests accurately reflect a person's job skills, aptitudes, or whatever else the test is supposed to measure, rather than the person's impaired skills.

   This requirement applies the reasonable accommodation obligation to testing. It protects people with disabilities from being excluded from jobs that they actually can do because a disability prevents them from taking a test or negatively influences a test result. . . .

   Some examples of Alternative Test Formats and Accommodations: . . .

   *Where it is not possible to test an individual with a disability in an alternative format, an employer may be required, as a reasonable accommodation, to evaluate the skill or ability being tested through some other means, such as an interview, education, work experience, licenses or certification, or a job demonstration for a trial period.

STATEMENT OF THE CASE

In this case, Plaintiff's treating neurosurgeon released him to return to work. The employer's doctor did not provide any accommodations to Mr. Rosenquist in taking his test and did not have any qualifications to perform vocational testing. The Defendant did not allow a trial work period to assess Plaintiff's ability to do his job as a reporter, with or without accommodations, even though all other applicants for the job were given an on-the-job work test. Nor did Defendant allow him to be correctly tested by an impartial vocational expert, despite his request for such an

examination. After an investigation, the EEOC determined that there was sufficient evidence to find probable cause of an ADA violation.

To fully appreciate the significance of the conflict created by the Second Circuit in articulating an unprecedented standard that the interactive process envisioned by Congress in identifying reasonable accommodations does not include an unbiased vocational test of the employee, it is essential to consider the procedural history and the uncontroverted facts.

A. Procedural History

On January 28, 1998, Plaintiff Mitch Rosenquist filed his Charge of Discrimination with the EEOC against Defendant Ottaway Newspapers, Inc. pursuant to the ADA, 42 U.S.C. § 12101, *et seq.*

On July 22, 1999, the EEOC determined that there was probable cause that the Defendant violated the ADA. It provided:

> The evidence shows the Charging Party went out of work on a medical leave on or around June 16, 1996. On April 4, 1997, the Charging Party was released to return to work in his previous position as a Reporter. The Respondent required medical clearance from an independent doctor before allowing the Charging Party to return to work. The Respondent solely selected and contacted the doctor to evaluate the Charging Party. The Charging Party was evaluated on July 7, 1997. The doctor opined the Charging Party was unable to perform the essential functions of a Reporter position and that there was not reasonable accommodation available to help him meet the requirements of his position. The record reveals that the Respondent failed to take into consideration the opinions of the Charging Party" doctors which conflicted with the opinion of the doctor it selected. The record further indicates the Respondent's doctor tested the Charging Party without the benefit of an accommodation and

> assessed the Charging Party based on limited information. Moreover, the Respondent failed to engage in any interactive process with the Charging Party to explore a reasonable accommodation, nor did the Respondent give the Charging Party any opportunity to show how he could perform the essential functions of a Reporter position with or without a reasonable accommodation. The evidence indicates that the Charging Party is able to perform the essential functions of a Reporter position with or without reasonable accommodation.

In upholding the unprecedented dismissal of an ADA on summary judgment after an EEOC finding of probable cause, the Second Circuit held: "The plaintiff does allege that he asked for a second, "non-partisan" medical examination, but since he has not adduced any evidence to show that the first examination was conducted in a biased manner, we cannot say that this request was a request for a reasonable accommodation."

B. Uncontested Facts.

Mitchell Rosenquist left his position as a reporter for the Plattsburgh Press Republican after suffering a brain aneurysm in June 1996. After rehabilitation, he asked his editor to be reinstated. His editor told Plaintiff that he needed a release to work by his doctor.

In April 1997, Plaintiff's treating neurosurgeon released him to return to work. Mr. Rosenquist wrote to the publisher formally requesting reinstatement in a "full-time position." The publisher wrote back requiring that a doctor hired by the newspaper examine him.

Plaintiff attended a one-half hour "examination" given by Defendant's Dr. Seth Wharton, a neurologist. Dr. Wharton did not use any books or treatises in preparing for the exam of Mr. Rosenquist or in writing his opinion letter. Dr. Wharton has no formal training in vocational training or rehabilitation medicine.

Dr. Wharton is not a neurophysiologist with expertise in behavior problems arising from neurological disfunctions. Dr. Wharton has no training in speech rehabilitation or speech pathology. He does not believe that there are standard parts to a normal neuropsychological exam.

Dr. Wharton is not an expert in journalism. Dr. Wharton does not know of any medical sources that provide that a neurologist is the proper person to determine whether a person can perform the essential functions of a job.

Dr. Wharton testified that he was hired to perform a neurological exam, not a vocational exam. Dr. Wharton did not do a formal job analysis of a reporter job. He only reviewed the job requirements sent to him by the Defendant.

Dr. Wharton did not talk to Plaintiff's treating doctor or rehabilitation therapists in preparation for the exam. He only reviewed the few notes sent to him by the employer. He did not review Mr. Rosenquist's full medical record.

The Defendant provided Dr. Wharton with a letter stating that Mr. Rosenquist would not get the job back unless he approved Plaintiff. Dr. Wharton also knew that the Defendant was paying him.

Dr. Wharton has no knowledge of how reporters are supposed to take notes or write stories. He does not know whether reporters type their stories. Dr. Wharton considered the essential functions of a reporter to be those in the job description provided to him by the Defendant.

Dr. Wharton gave Plaintiff a written test of an indeterminate time. He asked Plaintiff to read and summarize a new article from Popular Mechanics. Plaintiff used his left (non-dominant) hand to scribble his response. Wharton used the Popular Mechanics article because it was in his waiting room. Dr. Wharton said this was not a standard test, rather he felt that a reporter should be able to do it.

Dr. Wharton gave Plaintiff a dementia test for his cognitive functioning. Plaintiff scored within normal limits on this test. His ability to pay attention was normal; he understood ideas at a normal level; and his memory was normal.

Dr. Wharton gave his opinion that Mr. Rosenquist could not perform the essential functions of a reporter after this short exam. He did not believe there were any reasonable accommodations that would permit Mr. Rosenquist to be a reporter. Dr. Wharton did find that Plaintiff was not a danger to others if he returned to work.

After reviewing Dr. Wharton's report, the publisher told Plaintiff in writing that she would not return him to his job. She stated:

> The physician's examination and evaluation make it clear that your current speech and writing limitations are such that you cannot perform the essential functions of your job.

Plaintiff responded in writing that he "would also like a final, non-partisan job evaluation . . ." The publisher replied that she would not allow a further vocational evaluation. In any event, the publisher testified that she would not have necessarily have put Plaintiff back to work, even if Dr. Wharton found he could do the job with accommodations.

Plaintiff presented expert evidence from a rehabilitation physician, a doctor of neuropsychology, and a rehabilitation counselor that Dr. Wharton's examination and report were inaccurate in providing that Mr. Rosenquist could not perform the essential functions of reporter with or without accommodations.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS CREATED AND APPLIED THE UNPRECENTED LEGAL STANDARD THAT THE INTERACTIVE PROCESS DOES NOT REQUIRE EITHER

A TRIAL WORK PERIOD OR A NEUTRAL VOCATIONAL ASSESSMENT AFTER THE EMPLOYER'S DOCTOR DETERMINES THAT THE EMPLOYEE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF THE JOB.

The ADA guarantees a disabled employee the right to demonstrate that he can perform the job, with or without accommodations. See, e.g., Grenier v. Cyanmid Plastics, Inc., 70 F.3d 667, 675 (1st Cir. 1995); Stillwell v. Kansas City Board of Police, 872 F.S. 682, 688 (W.D.Mo. 1995); 29 C.F.R. § 1630.14(a). The EEOC Compliance Manual ¶V(5.6) provides: "Where it is not possible to test an individual with a disability in an alternative format, an employer may be required, as a reasonable accommodation, to evaluate the skill or ability being tested through some other means, such as an interview, education, work experience, licenses or certification, *or a job demonstration for a trial period*." [1]

In Swanson v. Allstate Insurance Company, 102 F.Supp.2d 949, 976 (N.D.Ill.2000), the court reviewed the interactive process required by the ADA. The employer must make a reasonable effort to determine the appropriate accommodation. The appropriate accommodation is best determined through a flexible, interactive process that involves both the employer and the [employee] with a disability. 29 C.F.R. pt. 1630, app. No party should be able to cause a breakdown in the process for the purpose of either avoiding or inflicting liability. Rather, courts should look for signs of failure to participate in good faith or failure by one of the parties to make reasonable efforts to help the other party determine what specific accommodations are necessary. A party that obstructs or delays the interactive process is not acting in good faith. (Grenier v. Cyanamid Plastics, Inc., 70 F.3d 667, 677 (1st Cir. 1995).

A "100% healed" or "fully healed" policy discriminates against qualified individuals with disabilities because such a policy

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[1] The EEOC's Compliance Manual is a body of experience and informed judgment to which the court may resort for guidance. Clackamas Gastroenterology Associates, P.C. v. Wells, 538 U.S. 440, 123 S.Ct. at 1680 (2003).

permits employers to substitute a determination of whether a qualified individual is "100% healed" from their injury for the required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation. McGregor v. Nat'l R.R. Passenger Corp., 187 F.3d 1113, 1116 (9th Cir. 1999) (collecting cases); see also Henderson v. Ardco, Inc., 247 F.3d 645, 653 (6th Cir. 2001) ("All courts that have examined the question . . . agree that a 100% rule is impermissible as to a disabled person"); Hutchinson v. U.P.S., Inc., 883 F.Supp. 379, 397 (N.D.Iowa 1995).

Any test performed by the employer must be validated to the job. Belk v. Southwestern Bell Telephone Company, 194 F.3d 946, 951 (8th Cir. 1999); 42 U.S.C. § 12112(d)(4); 29 C.F.R. §§ 1630.10, 1630.11 and 1630.14(c). In addition, any test of an employee's ability to perform the essential functions of the job must be performed with accommodations. Stutts v. Freeman, 694 F.2d 66 (11th Cir. 1983); EEOC Compliance Manual § 5.6(2). The determination of whether physical qualifications are essential functions of a job requires the court to engage in a highly fact-specific inquiry. Such a determination should be based upon more than statements in a job description and should reflect the actual functioning and circumstances of the particular enterprise involved. Hall v. U.S. Postal Serv., 857 F.2d 1073, 1079 (6th Cir. 1988).

The employer has the burden of proving that a given job function is essential. Ward v. Massachusetts Health Research Institute, Inc., 209 F.3d 29, 35 (1st Cir. 2000). In analyzing whether a *former* employee is qualified for *reinstatement* the burden shifts to the employer to prove the absence of current qualifications. Doane v. City of Omaha, 115 F.3d 624, 630 (8th Cir. 1997).

In Oswald v. LaRoche Chemicals, Inc., 894 F.Supp. 988 (E.D.La. 1995), the court held that the opinion of a company doctor that an employee cannot able to perform the functions of the

job is not determinative for purposes of summary judgment. [2] In Barnes v. Northwest Iowa Health Center, 238 F.Supp.2d 1053 (N.D.Iowa 2002), both of plaintiff's treating physicians unconditionally released her to work as a LPN at the defendant health center. The company doctor determined that she could not perform all of the essential functions of a licensed practical nurse and that no accommodation existed that would allow her to perform them. The court denied summary judgment to the employer and held that a rational jury could find that the unilateral determination that plaintiff could not perform the essential functions and failure to accommodate, despite the medical release, is evidence of bad faith and discriminatory animus.

In Chevron U.S.A., Inc. v. Echazabal, 536 U.S. 73, 86 (2002), this Court held that a medical examination of an employee by an employer, for purposes of the ADA, must "be based upon a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence," and upon an expressly "individualized assessment of the individual's present ability to safely perform the essential functions of the job." On remand, the Ninth Circuit held that Chevron did not meet this burden because the company's doctors did not consider the specific requirements of the employee's job and did not have expertise in the medical area in question. The Court of Appeals also held that the trial court should consider the opinions of the employee's medical experts. It noted that "the employer's determination of unemployability is not entitled to any deference [in an action to enforce the ADA]." Echazabal v. Chevron USA, Inc., 336 F.3d 1023, 1033 (9th Cir. 2003).

In Buck v. Fries & Fries, Inc., 953 F.Supp. 896 (S.D.Ohio 1996), aff'd, 1998 U.S.App.LEXIS 7074 (6th Cir. 1998)(unpublished) the employer hired an occupational medicine

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[2] This decision was favorably cited by the EEOC in 2-H ADA: Employee Rights EEOC NOTICE No. 915.002, date 2-12-97 (Enforcement Guidance), §§ II(A)(2) and II(B)(1).

physician to evaluate the plaintiff. [3] The occupational medicine doctor referred plaintiff to a neurospsychologist [4] for a comprehensive neurological examination, including "on-site observation" and a battery of neurological testing. The neurological tests indicated that plaintiff was "unfit to conduct bench chemistry in a reliable and safe manner." The court held that the employer had complied with the interactive process.

In Hogan v. Bangor and Aroostook Railroad Co., 61 F.3d 1034 (1st Cir. 1995), the employer requested that the employee seeking to return from an illness undergo a functional capacity test prepared specifically for him. However, there was no guarantee that the employee would be reinstated if he passed the test. The employee refused to take the test. The First Circuit held that the refusal to take the test was not a refusal of an unconditional job offer and upheld an award of damages under the ADA.

In Porter v. U.S. Alumoweld Company, Inc., 125 F.3d 243 (4th Cir. 1997), the employee's doctor released him to return to work. The company requested that he undergo a functional capacity test (from a doctor of his own choice). The employee never took the functional capacity test. Based upon these facts, the court held that the employee could not perform the essential functions of the job.

In Crocker v. Runyon, 207 F.3d 314 (6th Cir. 2000), the doctors for the Postal Service determined that the plaintiff could not perform the essential functions of a letter carrier. He was given the opportunity to present evidence from another medical provider that he could perform the job. However, he did not present such evidence. Based upon these facts, the court dismissed the discrimination claim.

In Swanson v. Allstate Insurance Company, 102 F.Supp.2d 949 (N.D.Ill. 2000) the employee violated the interactive process

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[3] The plaintiff agreed to the selection of the occupational-medicine doctor. 1998 U.S.App.LEXIS 7074 at *4.
[4] 1998 U.S.App.LEXIS 7074 at *4.

by refusing a third neutral psychiatric evaluation after her own doctor and the company doctor disagreed upon whether she could return to work. The employee in Swanson ended the interactive process by refusing a neutral, unbiased examination, just as the Plattsburgh Press Republican ended the interactive process by denying Mitch Rosenquist's request for a neutral, unbiased vocational evaluation. Such an evaluation would have authoritatively provided the vocational information of whether he could have performed the essential functions of reporter, with or without accommodations.

In the instant case, the Second Circuit has turned the interactive process on its head by holding that the employer does not have to allow a non-partisan vocational assessment after its own doctor determined that the employee could not perform the essential functions. It is uncontroverted that the employer's doctor provided no accommodations in the cursory examination of Mr. Rosenquist. Mr. Rosenquist provided expert evidence that the vocational exam was not performed correctly and that the employer's doctor had no expertise in performing such an exam.

It is further uncontroverted that all other applicants for a reporter position were provided with an on-the-job trial by the Plattsburgh Press Republican to determine their ability. Numerous courts have held that trial employment may be required by the interactive process to determine whether the employee can perform the essential functions of the job and what, if any, accommodations are needed. See, e.g., Webster v. Methodist Occupational Health Centers, Inc., 141 F.3d 1236 (7th Cir. 1998)(the employer did conduct a clinical work trial for the plaintiff; a*fter* the work trial, the employer concluded that she could not perform the essential functions of nursing, with or without accommodations); Gorin v. Apollo Travel Services, 1999 U.S.Dist.LEXIS 22209 (N.D.Ga. 1999)(the employer did a vocational analysis of the job and provided a work trial with a job coach); McMackins v. The Elk Grove Unified School District, 21 F.Supp.2d 1201 (E.D.Cal. 1998)(the employee was given a trial test period to return to work. She worked well, but then withdrew from the application process before taking the practical test. Based upon this breakdown in the interactive process caused by the employee, summary judgment

was granted to the employer); Valentine v. American Home Shield Corporation, 939 F.Supp. 1376 (N.D.Iowa 1996)(the employer allowed the employee to have a trial work period with an accommodation); Sprague v. United Airlines, Inc., 2002 U.S.Dist.LEXIS 14519 (D.Mass. 2002)(the court held that the interactive process required an employer to determine what work the employee was capable of doing); Webster v. Methodist Occupational Health Centers, Inc., 141 F.3d 1236 (7th Cir. 1998)(the employer conducted a clinical work trial for the employee before determining employee could not perform the essential functions).

The Defendant refused to let Mitch Rosenquist have a trial work period to assess his ability to perform the essential functions of reporter, with or without accommodations. It did not perform *any* valid vocational tests to determine whether he could perform the essential functions of a reporter. This ability can authoritatively be determined through proper vocational tests or a trial work period. Under the new rule articulated by the Second Circuit, there is *no* way for an employee to ever prove that he *can* do the essential functions after an exam by a company doctor.

II. THE SECOND CIRCUIT CREATED A CONFLICT AMONG THE CIRCUITS WITH ITS UNPRECENTED DETERMINATION THAT A FINDING OF PROBABLE CAUSE OF AN ADA VIOLATION BY THE EEOC IS NOT SUFFICIENT TO DEFEAT SUMMARY JUDGMENT.

The Ninth Circuit holds that an EEOC report finding probable cause of a prima face case *is* sufficient to raise an issue of fact in an ADA claim - precluding summary judgment against an employee. Mitchell v. Office of the Los Angeles County Superintendent of Schools, 805 F.2d 844, 847 (9th Cir. 1986), cert. denied, 484 U.S. 858 (1987) and Gifford v. Atchinson, Topeka, and Santa Fe Railway Company, 685 F.2d 1145, 1156 (9th Cir. 1981).

In Palasota v. Haggar Clothing Co., 342 F.3d 569, 577 (5th Cir. 2003), cert den., 2004 U.S.LEXIS 1137 (2004), the Fifth Circuit overturned a holding of directed verdict for the employer after a jury trial, providing: "The district court also ignored the EEOC's determination of reasonable cause, made after a two and one-half year investigation, to believe that [the employee . . . was] discharged in violation of the ADEA. An EEOC determination prepared by professional investigators on behalf of an impartial agency, is highly probative." In Smith v. Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972), the court held that the EEOC finding of reasonable cause is admissible at trial to prove a claim of discrimination and is highly probative of the ultimate issue of unlawful discrimination. It reasoned that the EEOC determination, prepared by professional investigators on behalf of an impartial agency is highly probative. It would be a waste of time and manpower to ignore the report of probable cause. See, Bell v. Birmingham Linen Service, Inc., 715 F.2d 1552 11th Cir.1983)(adopting Smith v. Universal Servs., Inc., id).

Other courts have held that held that a determination of probable cause by the EEOC is admissible to a jury as evidence to show a prima facie case (although not dispositive). EEOC v. Patrick Henry Education Association, 741 F.Supp. 670 (N.D.Ohio 1990), vacated on other grounds, 1990 U.S.App.LEXIS 13699 (6th Cir. 1990); Abrams v. Lightolier, 702 F.Supp.509 (D.N.J. 1988), aff'd in part, vacated in part, 50 F.3d 1204 (3d Cir. 1995); Sadruddin v. City of Newark, 34 F.Supp.2d 923 (D.N.J. 1999)(finding of probable cause by the EEOC, though not determinative, is admissible to help establish a prima facie case of discrimination).

In the instant case, the EEOC issued a finding of probable cause after an investigation. Based upon its expertise in interpreting and applying the ADA, the impartial report recited the facts that supported that legal conclusion. The Second Circuit has raised a conflict with all other reporting circuits in dismissing Mr. Rosenquist's claim on summary judgment, despite the probative EEOC finding. Why bother requiring an EEOC investigation if it cannot even raise a question of fact sufficient for a jury to decide the case?

CONCLUSION

The Second Circuit erred as a matter of law and caused a conflict with all other reporting circuits in holding that an employee does not have the right to a competent, neutral, vocational examination to determine whether he can perform the essential functions of his job under the ADA. It further erred in dismissing Plaintiff's claim before trial even though the EEOC had probable cause of a violation of the ADA after an investigation. The Second Circuit has effectively provided a mechanism for employers to discriminate against any employees who are disabled enough to be protected by the ADA. This Court should grant this Petition for a Writ of Certiorari to determine these important conflicts of law between the Second Circuit and the other reporting Courts of Appeal.

Dated: March 8, 2004

Respectfully submitted,
MARK SCHNEIDER
Counsel of Record for
Petitioner
57 Court Street
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APPENDIX

DECISION OF THE COURT OF APPEALS

MITCHELL ROSENQUIST, Plaintiff-Appellant, v. OTTAWAY NEWSPAPERS, INC. d/b/a The Plattsburgh Press-Republican, Defendant-Appellee.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

2004 U.S. App. LEXIS 1580

February 3, 2004, Decided

NOTICE: [*1] RULES OF THE SECOND CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of New York (Mordue, J.).

DISPOSITION: Affirmed.

JUDGES: PRESENT: HON. JON O. NEWMAN, HON. GUIDO CALABRESI, HON. BARRINGTON D. PARKER, Circuit Judges.

OPINION:

SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is **AFFIRMED.**

Plaintiff-Appellant Mitchell Rosenquist brought this action in federal district court, alleging that his former employer, Ottaway Newspapers, discriminated against him in violation of the Americans with Disabilities Act (ADA), *42 U.S.C. § 12101 et seq.*, by subjecting plaintiff to an independent medical examination when he sought to return to the workplace after a serious illness,

and by failing to rehire him as a political reporter. The district **[*2]** court granted the defendant's motion for summary judgment on all of the plaintiff's claims, and we affirm.

In June 1996, a ruptured brain aneurysm caused Rosenquist, then a reporter for the *Plattsburgh Press-Republican*, to suffer a debilitating stroke, resulting in, among other things, diminished cognitive function and speech ability. In early 1997, after a long hospitalization and intensive rehabilitation, Rosenquist applied for reinstatement to his former position. He provided the defendant with a letter from his own physician indicating that the doctor would not object to the plaintiff's returning to work, but making no reference to Rosenquist's ability to do the particular job he sought. The defendant asked Rosenquist to undergo an independent medical examination to determine whether he was capable of performing the essential functions of the political reporting job, which was the only reporting job arguably open. When, in July 1997, a neurologist determined that Rosenquist was unable to do so, with or without reasonable accommodations, the defendant informed Rosenquist that he would not be able to return to the paper as a political reporter at that time. Rosenquist was invited **[*3]** to keep the management apprised of his medical progress, so that they might consider him for positions in the future.

On appeal, Rosenquist contends that the independent medical examination (IME) ordered by the defendant was an unlawful medical inquiry, prohibited by the ADA. We agree with the district court that the defendant's decision to require an IME was justified by business necessity. *See Conroy v. N.Y. State Dep't of Corr. Servs., 333 F.3d 88, 97 (2d Cir. 2003)*. Because Rosenquist had suffered an aneurysm with obvious effects on speech, defendant had reason to doubt his abilities to perform the essential functions of a reporter. Insofar as Rosenquist contends that the defendant's failure to reinstate him constituted discrimination based on disability, the plaintiff has not adduced enough evidence to permit a jury to find that the defendant did not act in good faith in selecting the independent medical examiner, in providing him with a description of the political reporter position, n1 and in crediting the examiner's conclusion that, at the relevant time, plaintiff was incapable of performing the essential functions of his former job, with or without reasonable **[*4]** accommodation.

n1 A journalism professor who served as expert witness for plaintiff disputed the defendant's description of essential job functions, but even if a jury were to credit her assessment of the skills required, the defendant's acceptance of the medical examiner's conclusion that Rosenquist was not able to perform the job of political reporter was nevertheless reasonable.

Insofar as the plaintiff alleges that defendant failed reasonably to accommodate his disability, his claims likewise are unavailing. First, there is no indication in the record that there existed a reasonable accommodation that would have allowed Rosenquist to perform the essential functions of the job at the time that he applied for reinstatement. Further, while plaintiff argues that the defendant failed to enter into an interactive process that would have enabled the definition of a reasonable accommodation, the record does not indicate that the defendant refused to engage in such a process. n2

n2 The plaintiff does allege that he asked for a second, "non-partisan" medical examination, but since he has not adduced any evidence to show that the first examination was conducted in a biased manner, we cannot say that this request was a request for a reasonable accommodation.

[*5]

We have considered all of the appellant's arguments and found them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

APPENDIX

DECISION OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF NEW YORK
MITCHELL ROSENQUIST, Plaintiff v. OTTAWAY NEWSPAPERS, INC. d/b/a *The Plattsburgh Press Republican, Defendant. 00-CV-0802*

APPEARANCES:
MARK A. SCHNEIDER, ESQ., *Attorney for Plaintiff, 57 Court Street, Plattsburgh, New York 12901*
O'CONNELL AND ARONOWITZ, P.C., OF COUNSEL: Jeffrey J. Sherrin, Esq., *Attorneys for Defendants,* 100 State Street, Albany, New York 12207

NORMAN A. MORDUE, District Judge

MEMORANDUM-DECISION AND ORDER

INTRODUCTION

Plaintiff, Mitchell Rosenquist, was employed by defendant from 1987 to 1996. On June 16, 1996, suffered a ruptured brain aneurysm which rendered him comatose and disabled. Plaintiff was on medical leave from his employment at the defendant newspaper during the period following his hospitalization and subsequent rehabilitation efforts. Plaintiff suffered permanent brain damage as a result of the ruptured aneurysm which manifested itself by way of speech deficits and partial loss of use of his right hand and right leg. Defendant contends that plaintiff's brain damage affected his memory and cognitive and communication skills as well. Beginning in February 1997, plaintiff sought reinstatement of his employment status with defendant which was ultimately denied in July 1997. Plaintiff contends that defendant refused to rehire him based on a disability in violation of the Americans with Disabilities Act ("ADA") codified at 42 U.S.C. Section 12101 *et seq.*.

FACTUAL AND PROCEDURAL BACKGROUND

After reviewing the extensive material submitted by the parties in connection with their cross-motions for summary judgment, the Court summarizes the facts of the case as follows: Plaintiff Mitchell Rosenquist was employed by the defendant newspaper (the *"Press-Republican"*) as a reporter for nine years

prior to suffering from a sudden and unexpected ruptured brain aneurysm in June 1996. Plaintiff was initially in a coma and was hospitalized as a neurosurgery patient until September 1996, when he began in-patient hospital rehabilitation. Plaintiff was discharged to an outpatient rehabilitation program in December 1996, after which he continued to receive a combination of speech, occupational and physical therapies.

It is undisputed that plaintiff suffered permanent brain damage as a result of the ruptured brain aneurysm. He characterizes his difficulties as impairment of his ability to talk, walk, write and use his right hand. Defendant avers more broadly that plaintiff suffered from slurred and slow speech, difficulty in both finding and pronouncing words while communicating with others, loss of cognitive abilities, disorganized and diminished thought processes, inability to write with or use his dominant right hand, loud and inappropriate laughter and speech and partial loss of use of his right leg which affected his ability to walk.

As a result of his disabilities, plaintiff applied for Social Security Disability ("SSD") benefits, which application was approved in early 1997. Plaintiff also applied for and ultimately was approved in May 1997 to receive long-term disability benefits ("LTD") through defendant's employee benefit plan. In order to qualify for SSD, plaintiff had to certify and establish that he was unable to engage any substantial gainful employment. He also was required to certify that if he later became capable of working, whether or not he did so, he would promptly notify the Social Security Administration ("SSA"). Plaintiff collected LTD benefits through December 13, 1998, and continued to receive SSD benefits through at least the end of 2000. Plaintiff admits that he never notified either the SSA or defendant's LTD insurance carrier in writing that he was capable of working even after he returned to work as set forth below.[5]

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[5] Plaintiff does claim to have notified the SSA verbally that he capable of returning to work. To wit, plaintiff asserts that after obtaining a part-time reporter job in October 1998, he "physically drove over to the [SSA] and told them." He told the "person to persons" he spoke with at SSA that he "had a part-time job and would it affect [his] home pay, Social Security." Plaintiff testified that he "was told not at all. Or maybe they lowered it [he didn]'t know. And they said that will be it for five years, and to go away." Later, when he returned to work full-time, plaintiff averred that

According to defendant, plaintiff was highly regarded and very well-liked reporter prior to his brain injury. Three to four years prior to his aneurysm, plaintiff was assigned to the demanding, high profile "city/government beat," reporting on political and criminal events, judicial proceedings, emergency situations such as fires and similar events of immediate news interest. Plaintiff testified that he was a good reporter prior to his brain injury because he could speak to people "with clarity" and he "wrote well." In his words, plaintiff's writing was concise, grammatically correct, had proper spelling, used active verbs, was interesting and descriptive. Plaintiff also averred that he had very good organizational skills, and did most of his own editing since the *Press Republican* did little editing and expected reporters to turn in "printable" work. Prior to his aneurysm, plaintiff took notes by hand. Plaintiff did not dictate his notes or stories nor did he use a tape recorder because of short deadlines.

After plaintiff became ill, the *Press Republican* did not permanently fill his position. Plaintiff was kept on payroll status until December 1999 so that he could receive employee benefits, such as continued health insurance. The *Press Re*publican reassigned reporters, asked them to work overtime and made other adjustments to cover for plaintiff during his recovery, not knowing if he would ever come back to work. The newspaper held plaintiff's position open for more than a year and then hired a part-time reporter to assist in covering plaintiff's absence with the understanding that "when [plaintiff] came back, he would have the job." Defendant acknowledges that it was fully aware that if he came back to work, plaintiff would be disabled to some extent as a result of his brain injury.

Plaintiff first raised the prospect of returning to work at the Press Republican in February 1997, while he was in the midst of his rehabilitation therapy. At the time, plaintiff had begun visiting the newsroom at the paper. His former co-workers observed that his speech was garbled and unintelligible, that he was at a constant loss for words and that he had no use of his right arm. Persons

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he notified SSA "by phone, I think. And they said, okay, go ahead, you're still on our – still with us for five years." Plaintiff did not know who he spoke with at SSA but he thought it was in Durham, North Carolina where he moved subsequent to 1997.

employed by defendant testified that when plaintiff visited the newsroom he seemed "wounded," in a diminished capacity, and "frail." He had difficulty with speech and walked with a limp. Plaintiff was also observed to be inappropriately loud in the newsroom. He had a nervous laugh that was distracting and made people uncomfortable. One editor at the newspaper acknowledged during his deposition that plaintiff acted "goofy." Brenda Tallman, the publisher of the *Press Republican* testified that plaintiff's difficulty in speaking and communicating also made employees at the newspaper feel bad for him and uncomfortable. On February 27, 1997, James Dynko, the Chief Editor of the paper, and Bob Grady, the Managing Editor, took plaintiff to lunch and observed that he repeatedly became frustrated over his verbal stumbling and inability to express a thought.[6] During the course of this lunch meeting, Dynko and Grady told plaintiff that for him to come back to work, he would have to be "at the top of his game." Dynko did not believe that plaintiff was then capable of returning to work as a reporter, even on a part-time basis. Brenda Tallman concurred in this view. Both Dynko and Grady aver that they encouraged plaintiff to attend public meetings and/or write and submit articles and letters as examples of his ability to continue his previous good work although plaintiff denies theses allegations. Indeed, plaintiff's counsel continually argues that short of the affidavits submitted by Dynko and Grady, 'there is no evidence in the record" that defendant ever made a "formal or written" request that plaintiff submit a writing sample in furtherance of reinstatement. However, while Dynko acknowledged in his deposition that he never made a **written** request for writing samples from plaintiff, he testified that he had told plaintiff on a number of occasions that he should do some writing and submit it to the newspaper so "he could get back into it again, get back up on the saddle." Plaintiff admits he did not submit any writing exemplars.

On May 9, 1997, plaintiff met with Brenda Tallman, and Dan Swift, the General Manager of the newspaper, and requested

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[6] Dynko did state during his deposition that months later during the summer of 1997, he was able to understand plaintiffs speech if he "listened carefully."

to be reinstated.[7] The parties dispute whether plaintiff asked for **his old job** back or just **any** job at the *Press Republican*. Defendant also avers if offered plaintiff a non-reporter job which he disputes. In any event, there is no dispute that plaintiff was only interested in working **as a reporter** for the *Press Republican*. Plaintiff admits he did not request or identify any accommodation(s) that he believed he would have needed to perform his job functions although he testified that the newspaper "should have known" accommodations would be necessary. Specifically, plaintiff stated that he would have needed assistance with editing to "spruce up" his writing which "[took] a hit" as a result of the aneurysm. Indeed, while plaintiff was confident he could "get the general whos, whys, whats, wherefores, and how you do these," he needed help to "spruce it up with descriptive writing."[8] However, Ms. Tallman avers that "[t]he obvious problem [with plaintiff's request to return to work] was that [she] still had great difficulty understanding him when he spoke."

In response to his request to return to work, Ms. Tallman told plaintiff he would have to obtain a release from his doctor. Plaintiff then presented a note written to him from his neurosurgeon, Dr. Bednar, dated April 4, 1997, which stated the following:

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[7] It is undisputed that at the time plaintiff sought reinstatement in the spring of 1997, there were no reported vacancies at the Press Republican nor was the newspaper seeking to increase its staff. Plaintiff's previous political "beat" was being covered by various reporters and editors as referenced above. However, plaintiff avers that Brenda Tallman "never told [him]" that there was no position for him to return to at the newspaper. "To the contrary, she led [plaintiff] to believe that they were holding a position open for [him] if [he] could 'pass' their medical examination."

[8] However, in the affidavit submitted in connection with the present motions, plaintiff withdrew his characterization of assistance with editing as an "accommodation."

> I did not ask for accommodations when I asked to be reinstate because I did not consider using a tape recorder or a keyboard to be accommodations. Nor did I consider additional editing to be an accommodation. These are normally part of the reporter job.

> Following our telephone conversation today, you are requesting a letter that states you can return to work. Certainly at this time, if you feel that you can return to work, I would be very amenable to having you pursue this...

Plaintiff acknowledged during his deposition that Dr. Bednar neither knew the duties of a newspaper reporter nor commented specifically on plaintiff's ability to perform them in this "release." Indeed, plaintiff stated that Dr. Bednar essentially told him it was "safe" to go back to work. Ms. Tallman told plaintiff that the note from Dr. Bednar was not sufficient and that she would like plaintiff to be evaluated by an independent neurologist.

In a report dated the same day he requested his job back, plaintiff's speech language pathologist, Amanda Hunter, stated the following concerning plaintiff's progress with speech therapy:

> Mitchell Rosenquist,... has been receiving direct Speech Therapy Services...since April 10, 1997...Initial evaluation revealed difficulties with speech sounds and quality of voice resulting in mild to moderate disfluencies. Severity fluctuates depending on rate of speech and level of conversational difficulty (i.e., multisyllabic words, lengthy sentences)... Further deficits include mild to moderate word finding difficulties within his speech and writing, mild organizational deficits and mild memory deficits...
>
> Another focus of therapy has been working on job related skills to include interviewing and report writing. Mr. Rosenquist is 80-90% fluent when asking prepared interview questions. Fluency decreases when spontaneous questions are asked due to word finding disorders, however he is making gains in therapy. Writing deficits are characterized by grammatic[sic] and semantic errors, as well as mild organizational difficulties. Mild memory deficits persist, although use of compensatory strategies (i.e., tape recording, lists) assist to eliminate errors.

> Mr. Rosenquist will continue to work on job related skills within the course of therapy.[9]

Ms. Tallman testified that plaintiff gave her the report from Amanda Hunter at the time he requested reinstatement which plaintiff did not recall doing.[10] However, Ms. Tallman stated that specifically because the report "reflected...that [plaintiff] had too many deficits in speech, writing, organization and memory to return to his job" and the fact that plaintiff had been declared "totally disabled" by both SSA and the newspaper's long-term disability insurance carrier, she had concerns about his ability to return to work.

On July 8, 1997, plaintiff was examined by Seth Wharton, M.D., a board-certified neurologist, at the request of defendant.[11]

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[9] Defendant has attached numerous medical records and reports to its moving papers, all of which are unverified and uncertified copies. However, plaintiff has admitted to having undergone the medical treatment and therapies in question and does not dispute the content of the various notes and records in his response to Defendant's Local Rule ("L.R.") 7.1 Statement of Undisputed Facts.

[10] Defendant attaches other medical records concerning plaintiff to its motion papers in support of its contention that plaintiff was unable to function as a reporter at the time he sought reinstatement. For example, another speech therapist, Bonnie Myers stated the following in Progress Report covering the period April 7, 1997 to June 7, 1997:

> Progress has been consistent. Mr. Rosenquist's ability to express his thoughts has improved, but he needs increased time for language formulation, word retrieval and motor planning. Further practice in verbal expression tasks, writing and speaking skills is needed before he can successfully return to his former job as a newspaper reporter.

The court notes that these records are not denied or objected to by plaintiff. Although there is no proof that defendant had these records or was aware of their contents at the time it denied plaintiff reinstatement, the records are relevant to the extent that they demonstrate plaintiff's condition as defendant perceived it in July 1997.

[11] This independent medical examination ("IME") was arranged by the consulting firm of Stedman & Garger. Ms. Tallman acknowledged during her deposition that she knew nothing regarding Dr. Wharton's medical qualifications prior to plaintiff's IME.

The exam was scheduled for one half hour but Dr. Wharton stated that the time allotted in his schedule for an IME was "not necessarily reflective of the time spent [on the exam.]" Dr. Wharton testified that in sixteen years he had "done very few IME's" although he had done return-to-work type assessments for his own patients several hundred times. Dr. Wharton stated that he had testified in six or seven litigation matters, generally on behalf of defendants after having been retained by insurance companies. Dr. Wharton testified that he did not review any books or treatises or read any of plaintiff's medical records in preparation for the exam.

In his report dated July 10, 1997, Dr. Wharton relied on the oral history provided by plaintiff, his own neurological exam and personal observations in reaching his medical conclusions as follows.[12]

> Examination: The patient is alert and cooperative. His speech is, at times, incomprehensible and it is usually an

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[12] Dr. Wharton's report is in letter form, is unverified and unsworn. Thus, his opinion concerning plaintiff's ability to perform as a reporter has not been presented in admissible form. However, plaintiff does not dispute the content of Dr. Wharton's report in his response to defendant's L.R. 7.1 Statement of Undisputed Facts. Indeed, plaintiff paraphrases or quotes Dr. Wharton's report extensively in his own Statement of Undisputed Facts. As a further matter, Dr. Wharton testified at a deposition concerning his examination of plaintiff in July 1997 as follows: 1) he found that plaintiff's speech was often incomprehensible; 2) that plaintiff was suffering from right-sided hemiparesis; 3) that plaintiff scored subnormal or low when tested on cognitive functions of initiation and perseverance; and 4) that plaintiff had likely reached his maximum level of improvement one year post brain injury. Dr. Wharton testified that in July 1997, plaintiff was unable to return to work as a reporter based on the description of essential job functions provided to him by defendant and that there were no accommodations he could think of to assist plaintiff in overcoming the "problems" posed by his lingering disabilities. In any event, the Court need not consider Dr. Wharton's report solely for the truth of the matters it asserts. Rather, it may also be considered in the context of an attempt by defendant to demonstrate that assuming the Court finds a *prima facie* case of ADA discrimination herein, defendant had legitimate, non-discriminatory reasons for refusing to reinstate plaintiff.

effort to understand him. He wrote using his left hand, and his writing is very slow. I had him read 3 paragraphs from an article in Popular Mechanics and recapitulate what he had read, and it took him several minutes to produce what is photocopied in appendix A. His writing shows a major communication problem with poor grammar and the thoughts are poorly organized and at times, not really coherent. Cranial nerves were intact, except for right central facial weakness. Normal fundi and visual fields. Motor exam shows spasticity of the right side, moderate to severe in degree. Deep tendon reflexes are increased in that side and there is some clonus and a Babinski sign. He is hemiparetic. Tandem is unsteady. His right hand is very clumsy. A DRS "Dementia Rating Scale" was administered and the patient scored 126 out of a possible 144, which is just above the dementia cut-off of 122. On the subscales, he failed initiation and preservation.

No medical reports were forwarded.

I have reviewed the patient's essential job functions as a reporter.

Impression:

1. This patient has an aphasia and moderate severe right hemiparesis, following rupture of a cerebral aneurysm. This occurred over a year ago and hopefully he will continue to improve to some extent, but it is suspected for the most part, he is going to be in this condition permanently.
2. The patient's disabilities, as detailed above, do not represent a safety hazard at work.
3. The patient is not able to perform some of the essential functions of his job.[13] He is unable to meet the following standards:

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[13] Brenda Tallman testified at her deposition that she forwarded to Dr. Wharton a copy of the "description... used at the newspaper to explain the essential functions of the job of a reporter." James Dynko averred in his affidavit that this description "was in place in 1997, and for many years earlier." Plaintiff does not contest that the following was the job

a) Never misses basic events of assigned coverage

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description for a reporter at the *Press Republican* when he sought reinstatement:

Essential job functions
Position title: Reporter

Reports to: News Editor

Purpose: To provide reports in the daily and Sunday newspapers of interest to readers in Clinton, Essex, and Franklin counties through coverage of assigned news beat and composition of news and feature stories.

Duties and responsibilities:

- Never misses the basic events of assigned coverage areas and follows up on events without being assigned to do so.
- Routinely checks with news sources for story details and ideas and contributes these ideas independently and continuously.
- Keyboards well-balanced stories quickly, accurately and completely with few, grammatical and style errors, utilizing numerous sources and resources.
- Demonstrates ability to productively schedule time without supervision while spotting trends in coverage area and points out photo opportunities for same.
- Accepts responsibility for coverage of stories in assigned area and makes appropriate decisions as to what material to report and whether that should be reported in person or by telephone. Has ability to cover stories outside his/her assigned news beat.
- Writes stories on deadline that are well organized and answer all questions, are easy to read, are of the appropriate length and are free of factual and grammatical errors. Uses humor and other literary devices where appropriate. Employs a variety of writing styles. Routinely contributes balance of both hard and feature news.
- Constructively handles criticism and ideas for changes. Sources are always quoted accurately.
- Is receptive to questions and suggestions from readers and staff members and maintains contacts within the community that result in the development of story ideas and sources.
- Is open to change and to the development of skills.

b) He cannot write with "few if any grammatical and style errors"
c) He is unable to work at an adequate rate.
d) He cannot "write stories..., that are well organized and answer all questions, easy to read and are appropriate length and are free of factual and grammatical errors." He is unable to employ, "a variety of writing styles."
e) Unfortunately, I do not believe there is any reasonable accommodation that would allow this patient to fulfill the above standards.

Accompanying Dr. Wharton's report was the writing test plaintiff completed during the examination which required plaintiff to summarize the following magazine article:

1973 October Oil Embargo Starts a Panic

For decades, the United States had been getting Mideast oil at bargain prices. Sure, we had explored for the oil. Our oil companies had gone over there, drilled the wells, laid the pipes and pumped crude out of the desert. They paid off the sheiks, but somehow that money never got to the people. All of a sudden, for those and other sundry reasons, the petroleum-producing nations wanted more money for their oil. The oil-using world balked. So in October 1973, the producers shut off the spigot. It was hardball world politics at its roughest.

When the crunch hit, motorists felt the need to go to the pump whenever the needle stood anywhere below completely full. Some stations really had no gasoline, but the main reason for the long lines were all those additional trips.

The more lasting effect was the flight of Americans into smaller, more economical cars. The Japanese, who had been bringing in nothing but small cars for a decade, found themselves in heaven.

> For 1978, the federal government mandated the Corporate Average Fuel Economy standards. In 1979, another global oil crisis shook the world. This time, the U.S. government launched crash programs to develop electric vehicles, gasahol blends and oil exploration.

Plaintiff summarized the paragraphs as follows:

> In 1973 oil embargoeod (sic) hit. The oil embargeod (sic) countries fueled opinions. In 1979, it happened again. This (sic) though, there was talk of electric cars + solar.

Plaintiff testified that Dr. Wharton "only gave him a few minutes" to read and summarize the magazine article. Plaintiff averred that he had just started learning to write with his left non-dominant hand and the writing test did not reflect his "ability to absorb ideas, summarize them and put them into print."

Nevertheless, as a result of Dr. Wharton's report, Brenda Tallman advised plaintiff in writing that he could not return to "[his] job" at the *Press Republican*:

> [I]t is not possible for you to return at this time. The physician's examination and evaluation make it clear that your current speech and writing limiting are such that you cannot perform the essential functions of your job.

Ms. Tallman concluded her letter by offering to reconsider her decision if plaintiff's medical condition changed. Plaintiff then requested for a further "non-partisan" evaluation by another doctor. Ms. Tallman advised him that Dr. Wharton's report was "non-partisan." Plaintiff did not contact defendant again regarding reinstatement nor did he advise the newspaper of any subsequent change or improvement in his medical condition. He was "stunned" that Brenda Tallman denied his request for a second IME and refused him even the opportunity to attempt a "trial" work period. He states he does not know of any other *Press Republican* reporter or employee who was required to submit to an IME as a prerequisite to reinstatement. To the "best of [his] knowledge, a medical release had always been sufficient." Indeed, plaintiff avers that defendant's comptroller, Catherine Duquette,

"returned to work for the *Press Republican* after being out on long term disability for two years because of cancer. She was allowed to return part time, at first. Then she worked her way up to full time work. She was not required to take an independent medical exam before she came back to work."

Plaintiff believes defendant "set [him] up because they just did not want to reinstate [him]." Indeed, plaintiff avers defendant believed plaintiff would be an "embarrassment" to the newspaper, that he "looked, walked, talked, walked and laughed in a 'funny' or unusual manner." They did not want me back because of my disabilities despite the fact that I could perform the essential functions of a reporter."

In support of this contention, plaintiff points out that during the summer of 1997, he worked as a volunteer reporter for the North Country Center for Independence. This organization performs advocacy, peer counseling, information and referral, and independent living skills training for disabled people. In the span of approximately one month, plaintiff wrote two brief articles for agency's newsletter – Living Independently – which was published in August 1997.[14] Plaintiff used a tape recorder and took notes. A

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[14] The first article was entitled "ADA & Small Business Training and read as follows:

> PLATTSBURGH - The Americans with Disabilities Act (ADA) was the topic of discussion at a meeting held June 12, 1997, among a throng of small business owners and service providers.
>
> Andrea Haenlin-Mott, ADA Training Coordinator for the Northeast Disability and Business Technical Assistance Center, located at Cornell University's School of Industrial and Labor Relations said it is not fair to have a Bill of Rights and an ADA without trying to connect them. While the Bill of Rights is a Constitutional issue not likely to be forgotten, the ADA is only a matter of years old and not really heard about.
>
> All business owners must comply with the ADA or pay the price of not catering to everyone.
>
> Architectural or transportation tax deductions up to $15,000 per year are available to remove barriers.

representative of the agency testified that although the articles

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Owners of small businesses can opt for a small business tax credit for 50 percent reimbursement of the price associated with accommodating people with disabilities. "That's every year." Mott said, referring to how often owners can apply for it.

That is just to get into the building, to say nothing of what is required once inside. Once all the barriers are removed from the inside of the business, the more private matters must be addressed. They include: providing qualified readers, taped texts, providing interpreters or other effective methods of making orally delivered materials to hearing impaired, acquire or modify equipment for those with disabilities, and providing similar services wherever required.

The second article, entitled "Social Security Changes," read as follows:

PLATTSBURGH – Out of 350 people who collect Social Security Income (SSI) in Clinton and Essex counties about 50 children with "nonsubstantial" disabilities may lose theirs.

The comment came from sue Markham of the SSI Outreach Program.

"It is not senior citizens or non-citizens who will lost it, or the children who are developmentally disabled, but the marginally disabled," Markham said.

Of a move to deny all payments to the elderly, children, or disabled, "It's absurd," she said.

A review is being conducted on children currently receiving SSI, plus all the new and open SSI cases.

What to do if a family is informed of cancellation: parents can appeal within 60 days for administrative review; or, once they have been reviewed and denied, parents have another 10 days to make sure all their evidence has been heard. During which time SSI payments remain unchanged.

Markham recently moved to Utah, but information is available from the North Country Center for Independence.

were edited and revised a number of times, plaintiff's work required no more editing than other articles that had been submitted for publication. Notably, plaintiff admits he did not provide these articles to defendant as examples of his ability to work as a reporter.

On January 28, 1998, plaintiff files a Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") against defendant alleging that its refusal to reinstate him violated the ADA. On February 12, 1998, Antonio J. Gomez, M.D., a neurologist, conducted a neurobehavioral assessment requested by Dr. Bednar for the purpose of determining plaintiff's "employability as a reporter." In his report, Dr. Gomez concluded:

> ASSESSMENT: I strongly suspect that Mr. Rosenquist will be unable to perform as a reporter efficiently. He is now one year and eight months since his subarachnoid hemorrhage. Neurobehaviorally he still displays some residual, primarily in initiation, both language and motor. I am not certain that special equipment to help his handicapping situation would be production
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> ...
>
> 3. Patient education: I told patient, his wife and the lawyer that in my opinion working as a reporter would be extremely difficult for Mr. Rosenquist. I also told them that I am uncertain whether he has reached a plateau. I told them that my evaluation is a bedside one, i.e., non-normed. A formal neuropsychological evaluation would be most helpful in determining his capacities and whether his capacities with compensation from his employer would allow him to work efficiently as a reporter.

Plaintiff subsequently underwent a complete neurological evaluation by Owen W. Drudge, Ph.D., whom he saw twice in July 1998. Dr. Dredge's report stated as follows:

> The current evaluation finds Mr. Rosenquist functioning in the low average range intellectually, the impaired range neuropsychologically, and the 12^{th} to 12^{th}+ grade level

academically. Areas of relative strength identified upon testing include mental stamina, orientation, left-side motor function, recognition memory, vocabulary and reading comprehension. Areas of relative weakness or impairment noted are right-side motor function, speech production, comprehension or multi-step instructions, verbal learning/memory, tactile-spatial learning/memory, and written language usage.

...

Compared to his earlier testing with us in 11/96, Mr. Rosenquist demonstrates improvement in essentially all tested areas, with the most gains appearing in his communication and higher order verbal skills. At two years post onset, I would not anticipate a great deal of further recovery; although given the slow course of his recovery thus far, small additional gains are conceivable.

Mr. Rosenquist has a strong desire to resume his career as a newspaper journalist. Unfortunately, his old job is no longer available... Although I only have a rough idea of the functional demands of this type of work, it undoubtedly requires strong language-related skills, including communications, writing skills, and higher order verbal abilities. These skills, undoubtedly once his strength, have been affected seriously by his CVA and now constitute an area of weakness for him.

In a follow-up meeting with Mr. Rosenquist and his wife on 7/15/98, I reviewed the findings of his evaluation and expressed my concerns about him working again as a journalist. I suggested that a means of returning to his field in a slow and less demanding fashion would be a start writing for various publications without pay, such as contributing to newsletters of nonprofit agencies. This would allow him to exercise his researching and writing skills without the time and productivity expectations of paid employment. It also would provide him with portfolio material to offer prospective employers.

In spite of his doctor's reservations, plaintiff began working as a reporter for the *North Countryman*, a small northern New York weekly newspaper in October 1998. He later moved to North Carolina where he is now employed as a reporter for a daily newspaper in Danville, North Carolina. Plaintiff acknowledged during his deposition that the newspaper he presently works for does more editing of reporters' work than either the North Countryman or Press Republican. However, he states that he performs his job "without accommodations." Plaintiff avers that in the summer of 1997, he was "as capable of working as a reporter as [he is] now." He "agree[s] with Dr. Wharton's statement that [he] probably achieved the full extent of his rehabilitation in July 1997. In other words, if [he] can be a reporter now, [he] could have been one then." However, plaintiff also acknowledged during his deposition that in November 1998, he wrote a letter to the company managing payment of his student loans which stated: "My speech remains slow, or I can't be understood. My right side (leg and arm) are disabled and my brain isn't all it once was." By this plaintiff meant doctors told him his brain was "damaged" and he agree[d]." "I can't talk and I can't walk, I can't move. So yes. Yes."

On July 22, 1999, the EEOC issued an administrative determination of probable cause that defendant had violated the ADA in refusing to reinstate plaintiff. On February 28, 2000, after defendant refused to settle the claim through conciliation, the EEOC declined to prosecute the case itself and issued plaintiff a Notice of Right to Sue. In May 2000, plaintiff filed this lawsuit and now moves for partial summary judgment concerning defendant's liability under three provisions of the ADA. Specifically, plaintiff alleges that defendant violated the Act by: 1) subjecting him to an improper medical examination; 2) refusing to reinstate him despite his ability to perform as a reporter; and 3) refusing to offer any accommodation in assisting him with performing the job. Defendant does not dispute that at the time he sought reinstatement, plaintiff was disabled within the meaning of the ADA, but defendant opposes plaintiff's motion and cross-moves for summary judgement dismissing the complaint on the grounds that: 1) its request that plaintiff submit to an IME was reasonable because the nature of his disability suggested he might not be capable of working as a reporter; 2) plaintiff was not a

"qualified" individual with a disability within the meaning of the ADA because he could not perform all of the essential functions of his job when he sought reinstatement in July 1997; and 3) there were no accommodations which would have assisted plaintiff in performing his job and he did not request any accommodation in any event.

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c). Substantive law determines which facts are material; that is, which facts might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986). Irrelevant or unnecessary facts do not preclude summary judgment, even when they are in dispute. *See id.* The moving party bears the initial burden of establishing that there is no genuine issue of material fact to be decided. *See Celotex Corp v. Catrett*, 477 U.S. 617, 323 (1986). With respect to any issue on which the moving party does not bear the burden of proof, it may meet its burden on summary judgment by showing that there is an absence of evidence to support the nonmoving party's case. *See id.* At 325. Once the movant meets this initial burden, the nonmoving party must demonstrate that there is a genuine unresolved issue for trial. *See* Fed. R. Civ. P. 56(e). It is with these considerations in mind that the Court addresses the parties' motions for summary judgment.

B. ADA

1. Unlawful Employment Action

The ADA prohibits discrimination by covered entities, including private employers, against "qualified" individuals with a disability. Specifically, it provides that no "covered"[15] employer shall "discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms,

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[15] The term "covered entity" means an employer, employment agency, labor organization, or joint labor-management committee. *See* 42 U.S.C. § 12111(2).

conditions, and privileges of employment." 42 U.S.C. § 1212(a). A "qualified individual with a disability" is identified as "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." 42 U.S.C. § 12111(8). In turn, a "disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2). Accordingly, to fall within this definition one must have an actual disability, a record of disability, or be regarded as having one.

The term "essential functions," which is not defined in the ADA itself, is generally defined in Act's regulations to mean the "fundamental" duties to be performed in the position in question, but not functions that are merely "marginal," 29 C.F.R. § 1630.2 (n)(1)(1996).[16] "[C]onsideration shall be given to the employer's

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[16] The regulations also provide illustrations of the reasons that a given function may be found to be fundamental to the position and examples of evidence that may be considered in making that finding:

> Essential functions—(1) In general. The term essential functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term "essential functions" does not include the marginal functions of the position. (2) A job function may be considered essential for any of several reasons, including but not limited to the following:
>
> (i) The function may be essential because the reason the position exists is to perform that function;
>
> (ii) The function may be essential because of the limited number of employees available among whom the performance of that hob function can be distributed; and/or
>
> (iii) the function may be highly specialized so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.
>
> (3) Evidence of whether a particular function is essential includes, but is not limited to:
>
> (i) The employer's judgment as to which functions are essential;

judgment as to what functions of a job are essential, and if an employer has prepared a written job description ... this description shall be considered evidence of the essential functions of the job." 42 U.S.C. § 12111(8); *see also* 29 C.F.R. § 1630.2(m). "Plainly, the considerations set out in this regulation are fact-intensive." *Stone v. City of Mount Vernon*, 118 F.3d 92, 97 (2d Cir. 1997). "Usually no one listed factor will be dispositive, and the regulations themselves state that the evidentiary examples provided are not meant to be exhaustive." *Id.*

To state a *prima facie* case of discrimination under the ADA, a plaintiff must demonstrate that : 1) he suffers from a disability within the meaning of the ADA; 2) that he was otherwise qualified to perform the essential functions of his job or a job he was applying for; and 3) that he was not hired for the job or discharged because of his disability. *Wernick v. Fed. Reserve Bank of New York*, 91 F.3d 379, 383 (2d Cir. 1996).

2. Prohibited Inquiry

As stated above, the ADA is designed, in part, to protect employees from discrimination based on disabilities or perceived disabilities. *See Fountain v. New York State Dept. of Corr. Serv.*,190 F. Supp.2d 335, 338 (N.D.N.Y. 2002). Toward the end, the ADA prohibits employers from inquiring into whether the employee has a disability and the nature or severity of any such disability. *See* 42 U.S.C. § 12112(d)(4)(A). It also restricts the employer's ability to conduct medical examinations and to conduct inquiries that may uncover employees' disabilities or perceived disabilities.

(ii) Written job descriptions prepared before advertising or interviewing applicants for the job;

(iii) The amount of time spent on the job performing the function;

(iv) The consequences of not requiring the incumbent to perform the function;

(v) The terms of a collective bargaining agreement;

(vi) The work experience of past incumbents in the job; and/or

(vii) The current work experience of incumbents in similar jobs.

29 C.F.R. S 1630.2(n).

The ADA provides a limited exception to the general prohibition on medical inquiries, permitting them only when "shown to be job-related and consistent with business necessity." 42 U.S.C. § 12112(d)(4)(A). An inquiry falls within this exception when it is necessary to "'determine whether an employee is still able to perform essential functions of his or her job' ... or to ascertain whether '[the] employee will pose a direct threat to health and safety [in the workplace] due to a medical condition.'" *Fountain*, 190 F. Supp.2d at 338 (citations omitted). "A prohibited inquiry claim does not necessitate the same analysis of legitimate non-pretextual reasons for the inquiry that a general discrimination claim would." *Id.* (citation omitted). Instead, in order to fall within the exception provided for in Section 12112(d)(4)(A), the employer must demonstrate some reasonable basis for concluding that the inquiry was necessary. That is, the employer must show that it had some reason for suspecting that the employee, or class of employees, would be unable to perform essential job functions or would pose a danger to the health and safety of the workplace. *See id.* At 339. (citing *Ditullio v. Vill. Of Massena*, 81 F. Supp.2d 397, 411 (N.D.N.Y. 2000) ("An employee's behavior cannot be merely annoying or inefficient to justify an examination; rather, there must be genuine reason to doubt whether that employee can perform job-related functions.")

3. Failure to Provide Reasonable Accommodation

A "qualified" ADA plaintiff can also establish liability under the Act by showing: 1) that with reasonable accommodation, he could perform the essential functions of the position sought; and 2) that the employer refused make such accommodations. *See Stone v. City of Mount Vernon*, 118 F.3d 92, 96-97 (2d Cir. 1997) (citing *Lyons v. Legal Aid Society*, 68 F.3d 1512, 1515 (2d Cir. 1995)).

C. Estoppel

In the first instance, the Court will address defendant's contention that plaintiff's ADA claim is barred from the outset by his having applied for and received SSD benefits. In support of this argument, defendant cites the Supreme Court's decision in *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 804 (1999) which held that receipt of SSD benefits may be, but is not necessarily inconsistent with later raising an ADA claim, since the SSA does not take the possibility of "reasonable accommodation"

into account in awarding benefits, nor need an applicant refer to the possibility of reasonable accommodation in applying for benefits. "Nonetheless, in some cases an earlier [SSD] claim may turn out genuinely to conflict with an ADA claim." *Id.* At 805. To wit:

> An ADA plaintiff bears the burden of proving that she is a "qualified individual with a disability" – that is, a person "who, with or without reasonable accommodation, can perform the essential functions" of her job. 42 U.S.C. § 12111(8). And a plaintiff's sworn assertion in an application for disability benefits that she is, for example, "unable to work" will appear to negate an essential element of her ADA case – at least is she does not offer a sufficient explanation. For that reason, we hold that an ADA plaintiff cannot simply ignore the apparent contradiction that arises out of the earlier [SSD] total disability claim. Rather, she must proffer a sufficient explanation.

Id. At 806. To defeat summary judgment, that explanation must be sufficient to "warrant a reasonable juror's concluding that, assuming the truth of, or the plaintiff's good-faith belief in, the earlier statement, the plaintiff could nonetheless 'perform the essential functions' of her job, with or without 'reasonable accommodation.' *Id.* At 807. The Second Circuit has held that a plaintiff's failure to explain why he is "both disabled within the meaning of the Social Security Act, yet able to work within the meaning of the ADA" is fatal to an ADA claim. *DiSanto v. McGraw Hill, Inc./Platt's Div.*, 220 F.3d 61, 64 (2d Cir. 2000).

In the present case, plaintiff applied for SSD benefits in November 1996 stating he "became unable to work" in June 1996 as a result of a "disabling condition" and that he was "still disabled." There is no evidence proving or suggesting that plaintiff amended or supplemented this assertion to SSA prior to seeking reinstatement of his position at the *Press Republican*. Notwithstanding this unqualified statement of total disability on which plaintiff's continued receipt of SSD benefits was presumably based, plaintiff avers that he **could** perform the essential functions of a reporter at the time he sought reinstatement

in July 1997. With regard to this obvious inconsistency, plaintiff states:

> I did not report to Social Security or long-term disability that I could work after being rejected by the *Press Republican*. Until I finally went back to work with the North Countryman, I had no actual evidence that I could actually work, with or without accommodations. I reasonably considered myself to be totally disabled until I was able to get a job. On the other hand, I never reported to Social Security or Long-Term Disability after July 1997 that I was unable to work with accommodations. No one ever asked me this question. If anyone had asked me, I would have told them that I thought I could work, but the *Press Republican* felt that I couldn't work. In fact, that's what I wrote to Long-Term Disability and they never got back in touch with me. I immediately told Social Security and Long Term Disability when I did go back to work with the North Countryman. Social Security did not require me to fill out any forms. To the best of my knowledge, I have complied with all of the federal laws regarding Social Security disability benefits. All of my wages have been faithfully reported to the [SSA] by my employers.

Plaintiff cannot argue that the ADA's allowance of job performance with accommodation(s) cures the inconsistency here since he admits he never requested an accommodation nor did he believe he needed one. Plaintiff attempts to draw a distinction between being physically able to work and being psychologically able to work, but offers no legal authority for drawing such a distinction. *See Kennedy v. St. Francis Hosp.*, 2002 WL 31487898, *2, (D.Conn. Nov 4, 2002). Moreover, he admits that he "reasonably considered [himself] to be **totally disabled** until [he] was able to get a job." (emphasis added).

However, the Court notes that at the time plaintiff applied for SSD benefits, he was still an in-patient at a hospital rehabilitation center and his application for benefits was completed and supported by one of his treating physicians. The last note from any of plaintiff's treating **physicians** which appears in the record **prior** to plaintiff's attempt to return to work is Dr. Bednar's of January 10, 1997. At the time, Dr. Bednar noted plaintiff

"continued to show improvement in all aspects of his recovery." Further, "[plaintiff's] reading skills as well as speaking and cognitive function have also apparently improved." Dr. Bednar noted plaintiff's significant progress with "aggressive and persistent outpatient therapy." Although defendant contends Dr. Bednar discussed "24 hour supervision" with plaintiff during this office visit, it is clear that Dr. Bednar did so in the context of suggesting to plaintiff that if he felt safe by himself, he could "wean" himself from this precautionary measure.

Plaintiff's deposition transcript reveals that at the time he sought reinstatement of his position at the *Press Republican*, he believed – reasonably or not – that Dr. Bednar had authorized him medically to return to work based on the "release" prepared by Dr. Bednar in April 1997. Discounting Dr. Wharton's IME report and testimony for the purpose of this portion of defendant's motion and fully crediting the possibility that plaintiff's condition to improve, the Court finds that a jury could reasonably conclude that plaintiff's statements to SSA in November 1996 and his contention that he could perform the essential job functions of a reporter in July 1997 are not impermissibly inconsistent. Thus the Court finds that plaintiff's claim of total disability in the context of his application for SSD benefits in November 1996 is not legally conclusive of law of whether he was a "qualified" person with a disability within the meaning of the ADA in July 1997. Based thereupon, the Court declines to estop plaintiff from asserting his ADA claim.

D. EEOC Determination of Probable Cause

Plaintiff argues that this Court should defer to the EEOC's administrative determination that defendant likely violated the ADA in the present case. This Court will not do so nor is it required to do so pursuant to well-established case law. *See Paolitto v. John Brown E. & C., Inc.*, 151 F.3d 60, 65 (2d Cir. 1998) (decision to admit or rely on administrative findings of EEOC where record does not reflect what federal agency reviewed in reaching determination within sound discretion of district court).

E. Dr. Wharton's IME

Plaintiff moves for partial summary judgment on his claim that defendant's decision to subject him to an IME by Dr. Wharton was unlawful. While it is true that the ADA has specific provisions regarding the propriety of employer-mandated medical

examinations, a request for an appropriately-tailored examination "only establishes that the employer harbors doubts (not certainties) with respect to an employee's ability to perform a particular job" and "[d]oubts alone do not demonstrate" that the employee was subjected to unlawful discrimination. *Tice*, 247 f.3d. at 515 (citation omitted).

The evidence in the record concerning defendant's request that plaintiff submit to a medical examination amply demonstrates that the request was consistent with business necessity, and plaintiff has submitted virtually no evidence of his own in rebuttal. There can be no question that the serious nature of plaintiff's brain injury and the obvious physical and communication deficits he was experiencing at the time he sought reinstatement – deficits conceded by plaintiff and observed by several employees at the Press Republican – gave defendant cause to doubt plaintiff's ability to perform as a newspaper reporter. Indeed, plaintiff does not even dispute that defendant's concern about his medical condition was justified. Rather, he argues that defendant should have been content with the "release" he provided from Dr. Bednar. The absence of any comments regarding or reference to plaintiff's continued disabilities by Dr. Bednar belies plaintiff's claim that defendant had no justification for ordering an IME.

Plaintiff contends that defendant's request for an IME was not consistent with business necessity because it had never before or since requested an employee be subjected to an IME prior to returning to work. Plaintiff emphasizes that on one occasion, an employee who had been treated for cancer was permitted to return to work with only a doctor's certification as to her abilities. However, plaintiff provides no details of the nature or extent of the other employee's bout with cancer and no information concerning the quality of the medical release deemed sufficient by defendant in that instance. (*See Tice*, 247 F.3d. at 518 ("If we are to compare the application of an IME requirement across employees, we must first establish that the employees are, in fact, similarly situated. But [plaintiff] has submitted no details regarding this other ... employee [who was not subjected to an IME]; we do not know, for instance, the exact nature of that employee's illness, or whether the doctor who signed his Return to Work Certificate provided more details about the employee's condition than did [the doctor in plaintiff's case."). Based thereupon, the Court finds plaintiff is not

entitled to summary judgment on this aspect of his claim. Defendant has not specifically moved for dismissal of the unlawful inquiry claim. However, on this record, no rational trier of fact could find that defendant did not have a reasonable business-related concern over whether plaintiff – who admits he had trouble writing, walking and speaking at the time he sought reinstatement – could function as a reporter. In the absence of any triable issue concerning the business necessity of the medical examination, the Court has discretion to grant summary judgment to defendant.

F. Failure to Hire or Reinstate

I. Existence of Job Opportunity

As a prerequisite to launching his ADA claim, plaintiff must demonstrate that he applied for and was denied an actual job. Defendant contends that there was no available job at the *Press Republican* at the time plaintiff sought reinstatement. Consequently, defendant argues that it had no obligation to fire an existing employee or reorganize its reporter staff to make room for plaintiff. The Court notes that there is compelling evidence in the record which suggests defendant is correct, including testimony from various employees of the newspaper and plaintiff himself. Indeed, it appears that defendant "worked around" plaintiff's extended absence for some time before hiring a part-time reporter and then transferring an existing employee to cover plaintiff's former "beat." However, there is also uncontroverted evidence in the record which suggests that defendant was holding plaintiff's job or a job at the newspaper open for him until which time it was satisfied he could not return to work. Consequently, the Court finds that plaintiff's discriminatory failure to hire claim cannot be dismissed on the basis that defendant had no position available for plaintiff at the time he sought reinstatement.

2. Ability to Perform Essential Functions of Job

Defendant has submitted uncontroverted evidence concerning the Press Republican's assessment of the "essential functions" of a reporter. Defendant also submits the report and testimony of Dr. Wharton who opined that plaintiff was not capable of performing said essential functions. The record also contains various notes from plaintiff's various physical, occupational and speech therapists – all of which he admits in opposing defendant's motion – which demonstrate that plaintiff had significant lingering

cognitive, speech and communication deficits just prior to the time he was denied reinstatement.

In response, plaintiff argues two things: 1) notwithstanding his failure to object or question in evidentiary form the job description submitted by defendant, he argues that the Press Republican's description of essential job functions for a reporter is incorrect; and 2) he was qualified according to defendant's standards in any event. Plaintiff asserts that Dr. Bednar's April 1997 letter/"release" is "on of the lynchpins" of his motion. To wit, he argues that since defendant told him he could not return to work without a release from his doctor and he then provided a "release," he has established he was qualified for a reporter job at the *Press Republican*. This conclusion overlooks the above-referenced fact that nowhere in Dr. Bednar's so-called "release" does he acknowledge plaintiff's uncontroverted lingering disabilities. Nor does Dr. Bednar comment on plaintiff's ability to perform the essential functions of a reporter. Indeed, plaintiff admitted during his deposition that Dr. Bednar did not know or discus with him the duties or functions of a reporter. Plaintiff conceded that Dr. Bednar had essentially told him it was "safe" to go back to work prior to writing the April 1997 letter.

Plaintiff also relies on detailed reports from his various experts in this case – journalism professor Cailin Brown, neuropsychologist Paul Solomon, Ph.D., rehabilitation medicine expert mark Bucksbaum M.D., and rehabilitation counseling expert, Myron Smith – in support of his motion. Plaintiff asserts that these reports support contention that Dr. Wharton's conclusions were flawed and incorrect and he was able to perform all of the essential functions of a reporter in July 1997 when defendant refused to reinstate him. None of these expert reports, however, are verified, sworn to or in proper admissible evidentiary form nor has defendant conceded their admissibility or content in its motion papers.

Plaintiff argues in his memorandum of law that defendant's description of the essential job functions of a reporter would "qualify a reporter for the Pulitzer Prize." However, aside from a conclusory statement in his affidavit, the only evidence in the record which suggests that plaintiff was actually capable of working as a reporter **at the time he was denied reinstatement** is contained in the deposition transcript of plaintiff's journalism

expert Cailin Brown. Therein she states that the "dispatches" plaintiff wrote for the North Country Center for Independence during the summer of 1997 "show he was able to perform the essential functions of a newspaper reporter." However, she later conceded that these articles alone would not be a sufficient basis on which to hire a reporter. She stated she would have needed to review more writing samples to make a determination of plaintiff's skills: "It appears from his work in *Living Independently* that he has the necessary tools. Though because this publication doesn't go far enough, [she didn]'t know."

Further, Ms. Brown conceded that her opinion that plaintiff could work as a reporter was not specific to the *Press Republican* or to any type of reporting. She also acknowledged that: 1) she knew nothing of plaintiff's communicative skills in July 1997; 2) the "writing test" plaintiff completed during his IME with Dr. Wharton was not understandable or of publishable quality; 3) she did not meet plaintiff prior to preparing her report; 4) she did not know that the articles plaintiff wrote for the *North Countryman* on which she also relied on in stating he could work as a reporter in 1997 were written in 1998, more than one and a half years after plaintiff was denied reinstatement; and 5) although the two publications were geared towards very different audiences, Ms. Cailin could not state with a reasonable degree of certainty that at the time plaintiff produced the "*Living Independently*" articles he could have also produced the more extensive articles that later appeared under his byline in the *North Countryman*.

Finally, Ms. Brown admitted that the various accommodations she suggested which would have assisted plaintiff in performing as a reporter were raised "broad[ly]" as general accommodations she knew were made for reporters, but she had no idea of whether or how they would work at the *Press Republican*. Indeed, she knew nothing about the operations of the Press Republican or the different "beats" and schedules of *Press Republican* reporters. Thus, even if the Court overlooked the lack of an evidentiary basis for considering Ms. Brown's expert report, her deposition transcript reveals that her opinion is not dispositive on the relevant inquiry of whether plaintiff was capable of performing the essential functions of a reporter **at the *Press Republican*** in **July 1997**. For that matter, assuming *arguendo* that the Court accepted the additional expert reports submitted by plaintiff which are not in

admissible form, these experts – none of whom met plaintiff or reviewed any records in this case until years later – are equally unable to provide competent evidence concerning plaintiff's medical condition in July 1997 or his ability to perform as a newspaper reporter at that time.

Aside from Ms. Brown's largely ineffectual deposition testimony concerning plaintiff's ability to perform as a reporter in July 1997, plaintiff submits only his own opinion that since he had experienced most of his recovery by July 1997, he "could have been" a reporter then since he is "[capable of being one] now." This is not sufficient to satisfy plaintiff's *prima facie* burden of establishing that in July 1997, he was capable of performing the essential functions of the job he was seeking at the defendant newspaper. Plaintiff cannot rely on events which occurred after July 1997 in asserting that he was "qualified" within the meaning of the ADA to work at the *Press Republican* as a reporter at the time he was denied reinstatement, particularly because he admits he never submitted the writing he did that summer to defendant nor did he contact defendant after July 1997 to advise of any improvements in his medical condition or ability to work.

Moreover, plaintiff acknowledges that of one his own treating physicians suggested for several months subsequent to July 1997 that he was **still** not capable of working as a newspaper reporter. These uncontroverted records belie plaintiff's conclusory claim that his ability to work as a reporter **now** is dispositive of whether he could work as a reporter **then**. The evidence that plaintiff sought and obtained employment as a reporter for another newspaper in November 1998 and works as a reporter in North Carolina today is insufficient to meet his burden for establishing defendant's liability under the ADA for refusing to hire him as a reporter for the *Press Republican* in July 1997. In the absence of any additional evidence in the record from which a trier of fact could conclude that plaintiff was capable of performing the essential functions of the job he was seeking at the time he was denied reinstatement, the Court must grant defendant's motion for summary judgment on plaintiff's unlawful employment action claim.

F. Failure to Provide Accommodation

In his motion papers, plaintiff asserts that defendant violated the "interactive" process between employer and employee

contemplated by the ADA's requirement of providing reasonable accommodation to disabled employees. However, the complaint does not allege that plaintiff requested and was denied an accommodation. Indeed, plaintiff has consistently maintained that he did not request an accommodation and did not believe he needed one. Based thereupon, defendant contends that its obligation to provide a reasonable accommodation was never triggered in this case.

If indeed, plaintiff was suffering from an impairment requiring some accommodation by defendant, it was his burden to inform defendant of this fact in order to ascertain his protection under the ADA. Indeed, "[w]hen the nature of the disability, resulting limitations, and necessary accommodations are uniquely within the knowledge of the employee and his health-care provider, a disabled employee cannot remain silent and expect his employer to bear the initial burden of identifying the need for, and suggesting, a reasonable accommodation." *Taylor v. Principal Fin. Group., Inc.*, 93 F.3d 155, 165 (5th Cir. 1996). Defendant does not dispute knowledge of plaintiff's disability and the regulations implementing the ADA suggest that an employer has at least some responsibility to engage in communication with a disabled employee concerning accommodations, *see Jackan v. New York State Dept. of Labor*, 205 F.3d 562, 566 (2d Cir. 2000) ("The ADA envisions an "interactive process" by which employers and employees work together to assess whether an employee's disability can be reasonably accommodated ... Courts have struggled to define the appropriate burdens of persuasion when the process breaks down and an employee seeks relief on the ground that his employer failed to "reasonably accommodate" his disability.") (citing 29 C.F.R. § 1630.2(o)(3)[17] (balance of

[17] That regulation provides:

> To determine the appropriate reasonable accommodation, it may be necessary for the [employer] to initiate an informal, interactive process with the qualified individual with a disability in need of the accommodation. This process should identify the precise limitations resulting from the disability and potential reasonable accommodations that could overcome those limitations.

citations omitted). Based thereupon, plaintiff contends that the ADA required defendant to **initiate** discussions with plaintiff concerning a reasonable accommodation. Like the plaintiff in *Jackan*, plaintiff argues herein that defendant bears the burden of persuasion on "all facets of the question whether his disabilities could have been reasonably accommodated." 205 F.3d. at 567.

However, the question of whether an employer bears a legal duty to assist an employee "in identifying appropriate vacant **positions in the immediate aftermath of a request for reasonable accommodation** is analytically distinct from the question of which party bears the burden of persuasion" on the existence of a reasonable accommodation in the first instance. *Jackan*, 205 F.3d at 568 n. 4 (emphasis added). When a plaintiff brings an action alleging that a defendant violated the ADA by failing to offer a reasonable accommodation, the claim fails unless the plaintiff established that "an effective accommodation exist[ed] that would render [him] otherwise qualified." *Id.* At 566 (*citing Borkowski v. Valley Cent. Sch. Dist.*, 63 F.3d 131, 139 (2d Cir. 1995). The burden of persuasion on the "existence" of an "effective accommodation" is not satisfied by mere speculation. *Id.*

Plaintiff to date has never suggested he requested an accommodation or that an accommodation existed that would have allowed him to perform the essential functions of his job at the *Press Republican*. Rather, plaintiff contends that he should have been allowed a "trial work period" in which to access his ability to perform the job during which he would have been better able to determine what, if any, accommodations such as part-time work or flexible deadlines were required. However, *in Buck v. Fries & Fries, Inc.*, 1998 WL 165151, at *4 (6th Cir. 1998), on which plaintiff relies in support of this motion, the court held that an employee's request for an opportunity to demonstrate his ability to perform the essential functions of his job was not an accommodation. "[P]articularized testing of an employee's qualifications is simply not an accommodation under the ADA,

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29 C.F.R. § 1630.2(o)(3).

because it does not serve to enable an employee to perform his job – it only helps determine whether the employee is capable of performing his assigned tasks." Id.

With respect to the accommodations proposed by plaintiff's expert, Cailin Brown, she testified that the accommodations referenced in her report were generally available to reporters. However, Ms. Brown did not know and could not state that they would have been appropriate to accommodate plaintiff's specific circumstances or medical condition. Based thereupon, the relevant admissible evidence submitted by plaintiff on his failure to accommodate claim is insufficient to establish either that: 1) he requested and was denied a reasonable an accommodation in violation of the ADA; or 2) that any accommodation actually existed in July 1997 which would have rendered him "otherwise qualified" for the job he was seeking at the *Press Republican*.

G. Evidence of Discriminatory Intent

Even assuming plaintiff had established a *prima facie* case of employment discrimination under the ADA with proof that he was a **qualified** disabled person who was denied a viable job opportunity, plaintiff has submitted no evidence suggesting that defendant was motivated by unlawful discriminatory intent in failing to reinstate him.[18]

Plaintiff asserts that defendant's decision to subject him to a medical examination by Dr. Wharton constitutes evidence of its

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[18] *See Hayman v. Queens Vill. Comm. For Mental Health for Jamaica Adolescent Program, Inc.*, 198 F.3d 68, 72 (2d Cir. 1999) ("In analyzing a discriminatory discharge claim under the ADA, we apply the burden-shifting analysis established by the Supreme Court in *McDonnell Douglas Corp. v. Green*, [under which] plaintiff bears the initial burden of proving by a preponderance of the evidence a *prima facie* case of discrimination. The burden of production then shifts to defendants, who must offer through the introduction of admissible evidence a non-discriminatory reason for their actions that, if believed by the trier of fact, would support a finding that unlawful discrimination was not a cause of the disputed employment action. Plaintiff then must show that the proffered reason was merely a pretext for discrimination, which 'may be demonstrated either by the presentation of additional evidence showing that the employer's proffered explanation is unworthy of credence, or by reliance on the evidence comprising the prima facie case, without more.'") (internal quotation and citations omitted).

discriminatory intent. He argues in conclusory fashion that Dr. Wharton's IME was cursory, biased, inadequate and unsubstantial and part of a "set up" by defendant to discriminate against him on the basis of his disabilities. However, plaintiff provides no evidence in support of these allegations. During his deposition in this case, Dr. Wharton acknowledged several things deemed relevant by plaintiff:

- He had no formal training in vocational training or rehabilitation pathology
- He is not a neuropsychologist with expertise in behavior problems arising from neurological dysfunctions
- He had no training in speech rehabilitation or speech pathology
- He does not believe that there are "standard parts" to a normal neuropsychological exam
- He does not believe that there is a standard amount of time required to complete a neuropsychological exam
- He is not an expert in journalism
- He does not know of any medical sources that provide that a neurologist is the proper person determine whether a person can perform the essential function of a job
- He testified that he was hired to perform a neurological exam, not a vocational one
- He did not do a formal analysis of a reporter's job functions; he merely reviewed the job requirements sent to him by defendant
- He did not review the United States Department of Labor's Dictionary of Occupational Titles; he did not do a post injury vocational profile of transferable skills
- He did not talk to plaintiff's treating doctors or rehabilitation therapists in preparation for the exam
- He knew plaintiff would not get his job back unless he sent a favorable report concerning plaintiff to defendant; he knew he was being paid by defendant
- He had no independent knowledge of how reporters are supposed to take notes or write stories; he did not know whether reporter type this stories
- He considered the essential functions of a reporter to be those in the job description provided to him by defendant

- The writing test he gave plaintiff was of an indeterminate time; this was not a standard test, but Dr. Wharton believed a reporter should be able to do it
- He used the Popular Mechanics article because it was in the waiting room
- Plaintiff used his left (non-dominant) hand to write his response; Dr. Wharton cited no source for testing plaintiff using his left hand
- During his examination, Dr. Wharton found plaintiff's ability to pay attention was normal; he understood ideas at a normal level and his memory was normal
- Dr. Wharton did not consider plaintiff's motivation in returning to work in giving his opinion nor did he rely the alleged fact that plaintiff was making "steady gains" in therapy

The facts that: 1) plaintiff's IME was scheduled for 30 minutes; 2) Dr. Wharton did not review records or treatises or other materials in preparation for the examination; 3) Dr. Wharton relied on the uncontroverted description of the duties and responsibilities of a reporter at the *Press Republican* in determining plaintiff's ability to perform the essential function of his job; 4) subjected plaintiff to a brief and impromptu reading comprehension and writing test; 5) Dr. Wharton knew he had been hired by defendant in this case; 6) had testified for defendants before are simply insufficient, standing alone, to establish or raise a question that the IME was improper or that defendant's motive in subjecting plaintiff to it was discriminatory. [Plaintiff] cannot survive summary judgement on such a minimal record." *See Tice*, 247 F. 3d at 518.

Indeed, it is apparent from review of the evidence in this case that plaintiff was a talented, successful, well-liked and well thought of reporter at the *Press Republican* prior to his brain aneurysm and the tragic news of his illness was devastating to his fellow employees. Moreover, employees at the Press Republican clearly felt great distress and compassion for plaintiff when they observed the difficulty he had with walking, speaking and communicating effectively. Rather than demonstrating any suggestion of a discriminatory motive, the record shows that defendant went to great lengths to preserve plaintiff's position at the newspaper in the event of his recovery and only relinquished hope that he would reclaim his status as a valuable asset to the

writing staff of the newspaper when is was apparent that his lingering brain damage would effectively prevent him from returning to work as a reporter. It is uncontroverted that in July 1997, defendant did not foreclose the possibility of plaintiff returning to work at the *Press Republican* should his medical condition improve. Unfortunately, plaintiff chose not to keep defendant apprized of his medical progress and subsequent ability to return to work.

IV. CONCLUSION

Based upon the foregoing, plaintiff's motion for partial summary judgment on his ADA claims is **DENIED** and defendant's motion for summary judgement dismissing plaintiff's complaint is hereby **GRANTED**.

IT IS SO ORDERED.

Dated: March 31, 2003, Syracuse, New York. Norman A. Mordue, United States District Judge

APPENDIX

DECISION OF THE EEOC

U.S. EQUAL OPPORTUNITY COMMISSION
Buffalo Local Office

Charge No. 165980235

Mitchell Rosenquist, Charging Party, v. Plattsburgh Press Republican, Respondent.

DETERMINATION

Under the authority vested in me by the Commission's Procedural Regulations, I issue the following determination of the merits of this charge filed under Title I of the Americans with Disabilities Act (ADA) of 1990, as amended, 42 U.S.C. 12101, et seq.

Timeliness, deferral and all other requirement for coverage have been met. The Charging Party alleges he was not allowed to return to work following a medical leave of absence, and he was effectively discharged on July 18, 1997.

The Respondent denies the allegation and states that the Charging Party was no discharged, however he was also not allowed to return to work because he could not perform the essential function s of the Reporter position. The Respondent based its determination on a medical evaluation performed by an independent doctor.

The evidence shows the Charging Party went out of work on a medical leave on or around June 16, 1996. On April 4, 1997, the Charging Party was released to return to work in his previous position as a Reporter. The Respondent required medical clearance from an independent doctor before allowing the Charging Party to return to work. The Respondent solely selected and contacted the doctor to evaluate the Charging Party. The Charging Party was evaluated on July 7, 1997. The doctor opined the Charging Party was unable to perform the essential functions of a Reporter position and that there was not reasonable accommodation available to help him meet the requirements of his position. The record reveals that the Respondent failed to take into

consideration the opinions of the Charging Party" doctors which conflicted with the opinion of the doctor it selected. The record further indicates the Respondent's doctor tested the Charging Party without the benefit of an accommodation and assessed the Charging Party based on limited information. Moreover, the Respondent failed to engage in any interactive process with the Charging Party to explore a reasonable accommodation, nor did the Respondent give the Charging Party any opportunity to show how he could perform the essential functions of a Reporter position with or without a reasonable accommodation.

The evidence indicates that the Charging Party is able to perform the essential functions of a Reporter position with or without reasonable accommodation.

Upon finding that there is reason to believe that violations have occurred, the Commission attempts to eliminate the alleged unlawful practices through informal methods of conciliation. Therefore, the Commission now invites the parties to join with it in reaching a just resolution to this matter. The confidentiality provision of Section 107 of the ADA and the Commission Regulations apply to information obtained during conciliation.

When the Respondent declines to discuss settlement or when, for any reason, a settlement acceptable to the office Director is not obtained, the Director will inform the parties and advise them of the court enforcement alternatives available to aggrieved persons and the Commission. A commission representative will contact each party in the near future to begin conciliation.

Date: July 22, 1999

On behalf of the Commission, Elizabeth Cadle, Director, Buffalo Local Office

03-1308

Supreme Court, U.S.
FILED
APR 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

MITCHELL ROSENQUIST,

Petitioner,

-v-

OTTAWAY NEWSPAPERS, INC., d/b/a THE PLATTSBURGH PRESS REPUBLICAN,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: April 5, 2004

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Second Circuit of Appeals correctly held that the evidence adduced by petitioner was insufficient to permit a jury to find that the respondent did not act in good faith in selecting the independent medical examiner and crediting his conclusion that petitioner was incapable of performing the essential functions of his former job with or without reasonable accommodation?

2. Whether the Second Circuit of Appeals correctly held that respondent did not violate an obligation to provide a reasonable accommodation to petitioner?

3. Whether the Second Circuit Court of Appeals correctly found that there was no merit to petitioner's argument that the probable cause determination rendered by the EEOC was dispositive on the issue of summary judgment?

STATEMENT PURSUANT TO RULE 29.6

Ottaway Newspapers, Inc. is wholly owned by Dow Jones Ventures VI, Inc., which is wholly owned by Dow Jones and Company.

TABLE OF CONTENTS

COUNTERSTATEMENT OF QUESTIONS PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES iv

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 2

I. THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER AN EMPLOYER MAY RELY ON THE OPINION OF AN INDEPENDENT PHYSICIAN THAT AN EMPLOYEE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF HIS JOB. 2

II. THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER AN EMPLOYER MUST PROVIDE A TRIAL PERIOD OF WORK AS A REASONABLE ACCOMMODATION 3

III. THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE EFFECT OF AN EEOC PROBABLE CAUSE FINDING 6

SUMMARY 8

CONCLUSION 9

TABLE OF CITED AUTHORITIES

Federal Cases

Alexander v. Northland Inn,
321 F.3d 723 (8th Cir. 2003) 2
Bell v. Birmingham Linen Svc., Inc.,
715 F.2d 1552 (11th Cir. 1983),*cert. den.*,
467 U.S. 1204, 104 S. Ct. 2385 (1984) . . . 7
Buck v. Fries & Fries, Inc.,
1998 U.S. App. LEXIS 16125
(6th Cir. 1998) 3
Chinchillo v. Powell,
236 F. Supp. 2d 18 (D.D.C. 2003) 4
Claspell v. Denso Mfg.,
1998 U.S. Dist. LEXIS 11770
(W.D. Mich. 1998) 4
Feliciano v. Rhode Island,
160 F.3d 780 (1st Cir. 1998) 3
Garofalo v. Tonti Realty Corp.,
1997 U.S. Dist. LEXIS 819
(E.D. La. 1997) 4
*Gifford v. Atchinson, Topeka and
Santa Fe Ry. Co.*, 685 F.2d 1149
(9th Cir. 1982) 6
Gilbert v. Frank,
949 F.2d 637 (2d Cir. 1991) 4
Gorin v. Apollo Travel Services,
1999 U.S. Dist. LEXIS 22209
(N.D. Ga. 1999) 4
Hagan v. Anderson County Fiscal Court,
105 F. Supp. 2d 612
(E.D. Kentucky 2000) 3

McMackins v. The Elk Grove Unified School Dist., 21 F. Supp.2d 1201 (E.D. Cal. 1998) 5
Mitchell v. Office of the Los Angeles County Superintendent of Schools, 805 F.2d 844 (9th Cir. 1986), *cert. denied*, 484 U.S. 858 (1987) 1, 6
Palasota v. Haggar Clothing Co., 342 F.3d 569 (5th Cir. 2003), *cert. den.*, 2004 U.S. LEXIS 1137 (2004) . 7
Smith v. Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972) 7
Sprague v. United Airlines, Inc., 2002 U.S. Dist. LEXIS 14519 (D. Ma. 2002) 5
Swanson v. Allstate Ins. Co., 102 F. Supp.2d 949 (N.D. Ill. 2000) 3
Valentine v. American Home Shield Corp., 939 F. Supp. 1376 (N.D. Iowa 1996) 5
Webster v. Methodist Occupational Health Centers, Inc., 141 F.3d 1236 (7th Cir. 1998) 5

RESPONDENT'S BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This case involves the tragedy of a young man stricken with a brain aneurysm, which deprived him of many of his basic functions. Although he could no longer perform the essential functions of his job as a reporter for the respondent, he has accused his former employer of having discriminated against him by not re-instating him to his employment and of failing to provide him with a reasonable accommodation, although the evidence, including the statements of petitioner's own doctors, overwhelmingly demonstrates that no reasonable accommodation existed which would have enabled him to perform the essential job functions.

In his continuing refusal to face this difficult reality, petitioner has petitioned this Court for a writ of certiorari. In doing so, however, petitioner slants the facts of the case and misstates the Second Circuit's opinion. For example, as noted by the Second Circuit, petitioner, when seeking reinstatement, did not provide respondent with a fitness for duty letter from his physician. He merely provided a note indicating that his own physician did not object to the petitioner's returning to work, but "making no reference to Rosenquist's ability to do the particular job he sought" (Appendix, p. 25). The relevant facts are best summarized in the Second Circuit's opinion, as well as the opinion of the District Court, both of which have been reprinted in the Appendix to the Petition. Respondent respectfully refers the Court to those opinions.

In its opinion under the Summary Order, the Second Circuit held that 1) the IME ordered by the respondent was not an unlawful medical inquiry; 2) petitioner failed to provide sufficient evidence to find that respondent did not act in good

faith when it selected the independent medical examiner and relied upon his expert opinion; and 3) respondent did not fail to provide petitioner with a reasonable accommodation of his disability.

REASONS FOR DENYING THE WRIT

I.
THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER AN EMPLOYER MAY RELY ON THE OPINION OF AN INDEPENDENT PHYSICIAN THAT AN EMPLOYEE CANNOT PERFORM THE ESSENTIAL FUNCTIONS OF HIS JOB.

The first problem with petitioner's argument on this point is that it is based on a faulty premise. Petitioner couches this issue in terms of whether the petitioner was entitled to a neutral vocational assessment (Petition p.14). There is nothing in the record below to suggest that Dr. Wharton's assessment of petitioner's abilities was not neutral. Thus, petitioner is attempting to raise an issue that is not even before this Court.

Respondent was entitled to rely on Dr. Wharton's report rather than petitioner's untested opinion of whether he could do the job at issue. *Alexander v. Northland Inn*, 321 F.3d 723, 727 (8th Cir. 2003). As evident from the record below, contrary to the factual scenarios in cases raised by petitioner (Petition p.16), Dr. Wharton carefully reviewed petitioner's job duties and was a board certified neurologist, who had considerable experience evaluating his patients' abilities to return to work. Moreover, Dr. Wharton's opinion that petitioner could not perform the essential functions of his job was confirmed by petitioner's own psychologist, neuro-psychologist and neurologist. (See Appendix, pp. 33-43). Petitioner's argument is further eroded by the fact that petitioner's own doctor failed to state that he could perform

the essential functions of the job and, therefore, petitioner in reality relies only upon his own conclusions and assertions. *Id.*; *Feliciano v. Rhode Island*, 160 F.3d 780, 785-86 (1st Cir. 1998). Because petitioner has been unsuccessful on the merits of his case, he is trying to create an issue – no less a conflict among the circuits – that just does not exist.

II.
THERE IS NO CONFLICT IN THE CIRCUITS AS TO WHETHER AN EMPLOYER MUST PROVIDE A TRIAL PERIOD OF WORK AS A REASONABLE ACCOMMODATION

Courts that have reviewed the issue of whether an employer must offer a trial period of work as a reasonable accommodation have uniformly rejected such a claim. A trial period is not a reasonable accommodation under the law and no conflict exists among the circuits on this point. In *Buck v. Fries & Fries, Inc.*, 1998 U.S. App. LEXIS 16125 at **4 (6th Cir. 1998), the employee argued that a required accommodation "was an opportunity to demonstrate his abilities to perform the essential elements of his job." In rejecting this argument the Sixth Circuit held that such:

> Particularized testing of an employee's qualifications is simply not an accommodation under the ADA, because it does not serve to enable an employee to perform his job – it only helps to determine whether the employee is capable of performing his assigned tasks. [The employer] was entitled to rely on its own chosen method of coming to the conclusion that [the employee] was not qualified.

See also *Hagan v. Anderson County Fiscal Court*, 105 F. Supp. 2d 612, 615-17 (E.D. Kentucky 2000) (court denied disability discrimination claim despite plaintiff's suggestion that he be allowed to return to work for a trial period, which the employer did not do); *Swanson v. Allstate Ins. Co.*, 102 F. Supp.2d 949, 962 (N.D. Ill. 2000) (court denied disability

discrimination claim even though employee's counsel had suggested a trial work period, which the employer rejected); *Garofalo v. Tonti Realty Corp.*, 1997 U.S. Dist. LEXIS 819 *1-2 (E.D. La. 1997) (court denied disability discrimination claim even though doctor suggested a work trial, which the employer declined); *Claspell v. Denso Mfg.*, 1998 U.S. Dist. LEXIS 11770 *24-25 (W.D. Mich. 1998) (forcing a defendant to monitor a plaintiff for any length of time is not a reasonable accommodation in that it imposes an unwarranted burden on the employer who may have to commit personnel to monitor the employee and an employer is not required to shoulder this burden under the ADA); *Chinchillo v. Powell*, 236 F. Supp. 2d 18, 24-25 (D.D.C. 2003) (employee's suggestions for accommodation of his severe depression by granting him indefinite leave without pay or extending his trial employment period for several months to allow medical treatment to take effect were not reasonable accommodations where the prospect for improvement was speculative and the trial period would not have enabled him to complete his tasks or perform the job effectively). See also *Gilbert v. Frank*, 949 F.2d 637, 644 (2d Cir. 1991) (a reasonable accommodation does not mean the elimination of the job's essential functions).

Although petitioner supports his claim that he was entitled to a trial period as a reasonable accommodation with a string of cases, none of those cases actually supports that proposition (Petition, pp. 18-19). In fact, he generally relies upon district court, not circuit court cases. In *Gorin v. Apollo Travel Services*, 1999 U.S. Dist. LEXIS 22209 (N.D. Ga. 1999), not only was a trial period not an issue in the case, but the court granted summary judgment in the employer's favor. In doing so, the district court held:

> Employers do not have a generalized burden to investigate possible accommodations (citations omitted). Rather, under this Circuit's law, it is the plaintiff's burden to show not

> only that accommodation exists which would have allowed him or her to perform the essential functions of the job, but also to show that such an accommodation is reasonable. 1999 U.S. Dist. LEXIS 22209 *36.

In *Webster v. Methodist Occupational Health Centers, Inc.*, 141 F.3d 1236 (7th Cir. 1998), the sole Court of Appeals case from *any* circuit offered by petitioner, the trial period accommodation is not even addressed. The issue is similarly not addressed in *Sprague v. United Airlines, Inc.*, 2002 U.S. Dist. LEXIS 14519 (D. Ma. 2002). In that case, the Court notably states that the plaintiff's burden requires the plaintiff to show the proposed accommodation would enable him to perform the essential functions of the job, a concept that is consistent with the notion that a trial period is not an accommodation because it does not serve to enable the employee to actually do his/her job. In *McMackins v. The Elk Grove Unified School Dist.*, 21 F. Supp.2d 1201, 1206 (E.D. Cal. 1998), the only treatment of a trial period is an offhand reference that the plaintiff claimed she told her district representative she was willing to give a clerk position a trial run. However, the court noted, as was the case here, there was no evidence that the plaintiff could have performed the essential functions of her job with or without a reasonable accommodation. *Valentine v. American Home Shield Corp.*, 939 F. Supp. 1376 (N.D. Iowa 1996), the remaining case cited by petitioner, contains some oblique mention of the employer agreeing to part-time work during an eight week period. *Id.* at 1380, 1384-85. However, there is absolutely no suggestion in the case that any sort of trial period is mandatory as a reasonable accommodation.

In sum, the circuit courts, and even the district courts, do not disagree on the principles. Petitioner's effort to force judicial precedent into his view of the world is unavailing and does not create a conflict among the circuits. Respondent therefore respectfully submits that petitioner fails to

present a conflict among the circuits, much less one worthy of a writ of certiorari.

III.
THERE IS NO CONFLICT IN THE CIRCUITS AS TO THE EFFECT OF AN EEOC PROBABLE CAUSE FINDING

Petitioner attempts to find a final conflict by claiming that the Second Circuit made an "unprecedented determination" that a finding of probable cause of an ADA violation by the EEOC is not sufficient to defeat summary judgment. This argument also has no merit.

First, the Second Circuit's decision did not expressly address this issue. Instead, it simply stated in its conclusion that it had considered all of petitioner's arguments and found them to be without merit. (Appendix, p.26).

Second, this issue crafted by petitioner does not create a conflict among the circuits. Indeed, *Mitchell v. Office of the Los Angeles County Superintendent of Schools*, 805 F.2d 844, 847 (9th Cir. 1986), *cert. denied*, 484 U.S. 858 (1987), petitioner's leading case on this point and a case in which certiorari was denied, does not, as petitioner claims, declare that a probable cause finding by the EEOC is binding on a court. In *Mitchell*, the Ninth Circuit went no further than to find that although EEOC findings may be significant in a factual determination of discrimination, they are not binding on the court. The Ninth Circuit's decision in *Mitchell* superseded the Ninth Circuit's earlier decision in *Gifford v. Atchinson, Topeka and Santa Fe Railway Co.*, 685 F.2d 1149 (9th Cir. 1982), also cited by petitioner. (Petition, p.19). In any event, *Gifford* did not hold that EEOC probable cause determinations are dispositive in all cases. The decision is limited to its facts where the court found in that particular

case, the report was sufficient to create an issue of fact on a question before the court. (Id. at *4).[1]

Petitioner quickly moves on to the Fifth Circuit to try to create a conflict among the circuits. In his analysis of the Fifth Circuit decision in *Palasota v. Haggar Clothing Co.*, 342 F.3d 569 (5th Cir. 2003) (*cert. den.*, 2004 U.S. LEXIS 1137 (2004)), petitioner omitted a critical footnote. In footnote 13, the court makes clear that an EEOC probable cause finding is merely highly probative and should not be altogether ignored by the district court. Similarly, notwithstanding petitioner's analysis of *Smith v. Universal Services, Inc.*, 454 F.2d 154 (5th Cir. 1972), the Fifth Circuit again did not imbue an EEOC probable cause determination with per se finality. To the contrary, the Fifth Circuit expressly stated that an EEOC finding is not binding on either the court or the jury and is to be given no more weight than any other testimony given at trial. *Smith v. Universal Services, Inc.*, 454 F.2d at 157.[2] The decision of the Eleventh Circuit relied upon by petitioner, *Bell v. Birmingham Linen Svc., Inc.*, 715 F.2d 1552, 1557 (11th Cir. 1983), *cert. den.*, 467 U.S. 1204, 104 S. Ct. 2385 (1984), also fails to create a conflict among the circuits. In *Bell,* the Court held no more than did the Court in *Smith* and merely stated that an EEOC finding is

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[1] By contrast, the EEOC determination in this case fails to reveal the factual record, if any, upon which it relied in reaching its determination.

[2] The record in this case on summary judgment demonstrates that it is with good reason that courts have denied dispositive status to EEOC probable cause determinations. The EEOC determination issued here was made in July 1999, prior to the employer having had the benefit of discovery. Discovery yielded considerable evidence that undercuts the conclusions reached by the EEOC. Much of that evidence – collected only through discovery in the federal action -- was recounted in the decision rendered by the district court dismissing the case. (See Appendix to Petition For Writ of Certiorari, pp. 31-43).

admissible evidence and highly probative (noting the distinction in evidence between the trial record and the EEOC proceedings).

Petitioner's argument here is further belied by his own remaining recitation of a string of case holdings. At page 20 of his petition, he states that other courts have held that a determination of probable cause by the EEOC is admissible, *but admittedly not dispositive*, to establish a case of discrimination. Petitioner, by his own argument, defeats any possible claim that a conflict among the circuits exists on this point.

SUMMARY

All of the above being said, the other indisputable finding of both the district court and the Second Circuit Court of Appeals is that there is no evidence whatsoever in this record from which a jury could reasonably find that petitioner could perform the essential functions of the position of a reporter with respondent. Conflict among the circuits on an issue of law are without significance if the petitioner cannot prevail on the facts under either legal theory.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DATED: April 5, 2004